(9)

No. 99-166

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WEBSTER L. HUBBELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 26, 1999
CERTIORARI GRANTED OCTOBER 12, 1999

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120 pp

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON)

CASE #: 98-CR-151

USA

v.

HUBBELL, *et al.*

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
4/30/98	1	INDICTMENT filed against WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10, MICHAEL C. SCHAUFELE (3) count(s) 1, 2, 3, 5, 6-10, CHARLES OWEN (4) count(s) 1, 2, 3, 6-10 (erd) [Entry date 05/12/98]
5/29/98	18	MOTION filed by WEBSTER L. HUBBELL, SUZANNA W. HUBBELL to dismiss indictment or for a Kastigar Hearing as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10; Attachments 6. (erd) [Entry date 06/02/98]
6/16/98	37	RESPONSE by USA in opposition to motion to dismiss indictment or for a Kastigar Hearing as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10 [18-1] by defendant. (erd) [Entry date 06/19/98]

DATE		PROCEEDINGS
6/23/98	39	REPLY MEMORANDUM by WEBSTER L. HUBBELL in support of motion to dismiss or for a Kastigar Hearing [18-1] by defendant (blj) [Entry date 06/25/98]
6/26/98	—	MOTION HEARING before Judge James Robertson as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN: Taken under advisement motion to compel disclosure of application for jurisdiction [25-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBBELL (2), MICHAEL C. SCHAUFELE (3), CHARLES OWEN (4), taken under advisement motion to strike prejudical surplusage from the indictment [21-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBBELL (2), MICHAEL C. SCHAUFELE (3), CHARLES OWEN (4), taken under advisement motion to dismiss indictment as violation of 28 U.S.C. 594(f)(1) as to WEBSTER L. HUBBELL (1) count(s) 2, SUZANNA W. HUBBELL (2) count(s) 2 [20-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBBELL (2), taken under advisement motion to dismiss indictment on the ground that it is outside the jurisdiction of the Independent Counsel as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10 [19-1] as to WEBSTER L. HUBBELL (1), taken under advisement motion to dismiss indictment or for a Kastigar Hearing as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2) count(s) 1, 2, 3, 6-10 [18-1] as to WEBSTER L. HUBBELL (1), SUZANNA W. HUBELL (2). Government motion

DATE		PROCEEDINGS
		for leave to file certain documents under seal, heard and granted. Defendant continued on PR bond. Reporter: Dennis Dinkel (su) [Entry date 07/13/98]
6/30/98	48	TRANSCRIPT filed as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN for date of 6/26/98. Reporter: Dennis A. Dinkel (ks) [Entry date 06/30/98]
7/1/98	49	MEMORANDUM OPINION by Judge James Robertson as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN (N) (erd) [Entry date 07/01/98]
7/1/98	50	ORDER by Judge James Robertson as to WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, CHARLES OWEN: granting motion to dismiss indictment on the ground that it is outside the jurisdiction of the Independent Counsel as to WEBSTER L. HUBBELL (1) count(s) 1, 2, 3, 4, 6-10, SUZANNA W. HUBBELL (2), count(s) 1, 2, 3, 6-10 [19-1], as to WEBSTER L. HUBBELL (1). That defendant Webster L. Hubbell's motion to dismiss the indictment as violative of an immunity order entered by the United States District Court for the Eastern District of Arkansas [18] is granted. That defendants' joint motion to dismiss counts six through ten for failure to state an offense [23] is denied. That the defendant's joint motion to dismiss count two as violative of the independent counsel reauthorization act of 1994 [20] is denied. (N) (erd) [Entry date 07/01/98]
7/7/98	51	NOTICE OF APPEAL filed by USA from Court's order filed 7/1/98 and docketed 7/

DATE		PROCEEDINGS
		1/98. Counsel and Defendant(s) notified. Docketing statement: not received. NO FEE: GOVT. (erd) [Entry date 07/07/98] [Edit date 08/13/98]
6/30/99	58	SUPERSEDING INFORMATION filed against WEBSTER L. HUBBELL (1) count(s) 1s. (hsj) [Entry date 07/06/99]
6/30/99	—	ARRAIGNMENT held before Judge James Robertson as to WEBSTER L. HUBBELL (1) count(s) 1s: Attorney appearance for WEBSTER L. HUBBELL by, John Nields. Plea guilty entered by WEBSTER L. HUBBELL (1) count(s) 1s, a misdemeanor. Motion of government to dismiss defendants #2, 3 and 4, heard and granted. Defendant on probation. Reporter: Dennis Dinkel (hsj) [Entry date 07/21/99]
6/30/99	—	SENTENCING by Judge James Robertson for WEBSTER L. HUBBELL (1) count(s) 1s. Defendant sentenced to one (1) year probation to run concurrently to the term of probation imposed in Criminal Case Number 98-394; Special Assessment of $25.00 imposed. Defendant on probation. Court Reporter: Dennis Dinkel (hsj) [Entry date 07/21/99]
6/30/99	60	PLEA AGREEMENT filed as to WEBSTER L. HUBBELL. (hsj) [Entry date 07/21/99]
7/1/99	61	JUDGMENT and Probation Order issued by Judge James Robertson as to WEBSTER L. HUBBELL, with Statement of Reasons. (hsj) [Entry date 07/21/99]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-3080

U.S.A.

v.

WEBSTER L. HUBBELL, *et al.*

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/7/98	CRIMINAL CASE docketed. Notice of Appeal filed by Appellant USA. [364790-1] (jth)
8/24/98	BRIEF filed by Appellant USA [377381-1]. Copies: 15. Certificate of service date 8/24/98. (jth)
8/24/98	JOINT APPENDIX filed [377387-1]. Copies: 10. Certificate of service date 8/24/98. (jth)
9/18/98	BRIEF LODGED by Amicus Curiae for Appellant USA (Acting Through the Attorney General) [383522-1]. Copies: 15. Certificate of service date 9/18/98. (jth)
9/18/98	MOTION filed (5 copies) by Amicus Curiae for Appellant USA, Acting Through the Attorney General (certificate of service dated 9/18/98) to file brief as amicus curiae [383524-1], and to exceed the word limit [383524-2]. (jth)
9/23/98	PER CURIAM ORDER filed granting appellees' motion to file a motion to exceed the limits on

DATE	PROCEEDINGS
	length of brief out of time; Clerk directed to file the lodged motion; Granting motion to exceed the limits on length of brief; Appellees brief, not to exceed 15,000 words, due by 9/24/98; Granting motion to file an amicus curiae brief for the US through the Attorney General and to exceed the word limits; Clerk directed to file the lodged brief of amicus curiae. [383530-1] [383529-1] [383524-1] [383524-2] [383522-1] Before Judges Wald, Tatel. (cwc)
9/23/98	PER ABOVE ORDER lodged brief of amicus curiae filed [383522-1]. (cwc)
9/24/98	BRIEF filed by Appellee's Webster Hubbell, Suzanna Hubbell, Michael Schaufele, and Charles Owen [384662-1]. Copies: 15. Certificate of service date 9/24/98. (jth)
10/8/98	REPLY BRIEF filed by Appellant USA [388234-1]. Copies: 15. Certificate of service date 10/8/98. (jth)
10/21/98	ORAL ARGUMENT HELD before Wald, Williams, Tatel . (sgh)
10/27/98	TRANSCRIPT of oral argument held on 10/21/98. [364772-1] (jth)
1/26/99	JUDGMENT for the reasons in the accompanying opinion reversing [411798-1] & remanding case to the USDC [411798-2]. Before Judges Wald, Williams, Tatel. (edb)
1/26/99	OPINION (64 pgs) for the Court filed PER CURIAM, CONCURRING IN PART I OPINION (4 pags) filed by Judge Wald, DISSENTING IN PART I OPINION (20 pgs) filed by Judge Tatel, DISSENTING IN PART II OPINION (12 pgs filed by Judge Williams. (edb)
1/27/99	PER CURIAM ORDER filed amending Per Curiam opinion filed 1/26/99, page 8, dissenting opinion

DATE	PROCEEDINGS
	filed by Circuit Judge Williams. (SEE ORDER FOR DETAILS) [411805-4]. Before Judges Wald, Williams, Tatel. (edb)
3/12/99	PETITION for rehearing [422430-1], PETITION for rehearing in banc [422430-2], (20 copies) filed by Appellant USA (certificate of service dated 3/12/99). (jth)
3/16/99	CLERK'S ORDER filed directing appellees to respond to the petition for rehearing and petition for rehearing en banc and to do so on or before March 31, 1999 [422430-1]. The United States as Amicus Curiae is invited to file a response on or before March 31, 1999. A reply to the response will not be accepted by the court. (jth)
4/7/99	RESPONSE filed [427861-1] by Appellee Webster L. Hubbell (certificate of service dated 4/7/99) to the petition for rehearing and petition for rehearing in banc. (jth)
4/7/99	RESPONSE filed [427877-1] (5 copies) by Amicus Curiae for Appellant (USA) to the petition for rehearing, petition for rehearing in banc. (certificate of service dated 4/7/99). (jth)
5/4/99	PER CURIAM ORDER filed denying appellant's petition for rehearing [422430-1] filed March 12, 1999. (Mandate may issue on or after 5/12/99). Before Judges: Wald, Williams, Tatel. (Circuit Judge Williams would grant the Petition). (jth)
5/4/99	PER CURIAM ORDER In Banc, filed denying the petition for rehearing en banc [422430-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland. (Circuit Judges Silberman, Williams, Ginsburg and Randolph would grant the

DATE	PROCEEDINGS
	Petition for Rehearing En Banc). (Circuit Judges Sentelle and Garland did not participate in this matter). (jth)
5/18/99	MANDATE ISSUED to Clerk, District Court [436614-1] Awaiting rehearing petition cancelled. (edb)

[Filed in Open Court Apr. 30, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 98-0151

UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL, SUZANNA W. HUBBELL,
MICHAEL C. SCHAUFELE, and CHARLES C. OWEN,
Defendants

VIOLATIONS:

Count 1—Conspiracy
(18 U.S.C. § 371)

Count 2—Impede and Impair the IRS
(26 U.S.C. § 7212(a))

Count 3—Tax Evasion
(26 U.S.C. § 7201)

Counts 4-5—Aid in Preparing False Return
(26 U.S.C. § 7206(2))

Counts 6-10—Mail and Wire Fraud
(18 U.S.C. § 1341, 1343 and 2)

INDICTMENT

THE GRAND JURY CHARGES:

INTRODUCTION

1. WEBSTER L. HUBBELL was an attorney at the Rose Law Firm in Little Rock, Arkansas. In 1993, he became Associate Attorney General at the Department of Justice.

2. In 1994, WEBSTER L. HUBBELL resigned from the Department of Justice. In late 1994, WEBSTER L. HUBBELL pled guilty in connection with his fraudulent billing during 1989-1992 of almost $400,000 at the Rose Law Firm.

3. The fraudulent billing resulted in additional income that WEBSTER L. HUBBELL and his wife, SUZANNA W. HUBBELL, did not report on their state and federal tax returns. This additional unreported income, in turn, created additional tax due.

4. In addition to owing taxes, interest and penalties for 1989-1992, the HUBBELLs did not pay a substantial portion of their tax liabilities for 1994 and 1995.

5. Beginning in 1995, the Internal Revenue Service, the State of Arkansas, and the District of Columbia took steps to collect the HUBBELLs' delinquent taxes. By late 1997, the taxes, interest and penalties for 1989-1992, 1994, and 1995 exceeded $894,000.

6 a. During 1994 through 1997, WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE (a certified public accountant and HUBBELL friend), and CHARLES C. OWEN (an attorney and HUBBELL friend), and others, took various steps to conceal the HUBBELLs' income, and to impede the

ascertainment, assessment, and collection efforts of certain creditors, including the Internal Revenue Service (IRS), the State of Arkansas, the District of Columbia, and the Rose Law Firm. These steps included, but were not limited to, the following:

b. Between 1994 through 1997, WEBSTER L. and SUZANNA W. HUBBELL had income in excess of one million dollars, but made only modest tax payments to the Internal Revenue Service toward paying their 1989-1992, 1994 and 1995 tax liabilities.

c. During the same period, the HUBBELLs spent over $750,000 on personal items. The HUBBELLs liquidated assets and spent down their funds which reduced the amount of money available to the IRS and other government creditors.

d. MICHAEL C. SCHAUFELE prepared and filed false federal tax returns for the HUBBELLs for 1994, 1995, and 1996, which understated income and tax.

e. MICHAEL C. SCHAUFELE, assisted by CHARLES C. OWEN, created and used bank accounts which assisted the HUBBELLs in concealing funds from the Internal Revenue Service and other creditors.

f. SUZANNA W. HUBBELL and CHARLES C. OWEN provided false and incomplete financial information to the IRS to conceal the existence of a bank account and to conceal the existence of trusts of which the HUBBELLs were beneficiaries.

g. CHARLES C. OWEN created a company called Bridgeport Group, LLC (Bridgeport), and assisted MICHAEL C. SCHAUFELE in setting up a Bridgeport bank account to conceal funds from and impede the ascertainment, assessment, and collection efforts of the

IRS, the State of Arkansas, the District of Columbia and the Rose Law Firm.

7. Through these and other efforts, the HUBBELLs attempted to impede and impair these creditors and pay substantially less money than they owed and were able to pay.

GENERAL ALLEGATIONS

8. From in or about 1973 through in or about 1992, WEBSTER L. HUBBELL was an attorney in the Rose Law Firm of Little Rock, Arkansas.

9. In or about January 1993, WEBSTER L. HUBBELL began his employment with the United States Department of Justice.

10. In or about May 1993, WEBSTER L. HUBBELL was confirmed as an Associate Attorney General at the Department of Justice.

11. In or about March 1994, WEBSTER L. HUBBELL announced his resignation from the Department of Justice, which took effect in April 1994.

12. In or about March 1994, there was a meeting at the White House, at which was discussed the issue of whether WEBSTER L. HUBBELL should resign due to allegations concerning HUBBELL's possible over billing of the Rose Law Firm and its clients while he worked there. Subsequently, one or more individuals suggested that efforts be taken to assist WEBSTER L. HUBBELL in obtaining work.

13. At the time WEBSTER L. HUBBELL resigned from the Department of Justice, the Rose Law Firm had already started examining HUBBELL's prior billing practices at the Firm. The Rose Law Firm started its inquires in approximately Spring 1993, and continued to make in-

quiries of HUBBELL concerning possible fraudulent billing of personal expenses to clients and the Firm.

14. In or about May 1994, a Special Prosecutor served WEBSTER L. HUBBELL with a federal grand jury subpoena commanding HUBBELL to produce certain financial information, including tax return information and information relating to his billing practices.

15. Beginning in or about April 1994, WEBSTER L. HUBBELL commenced holding himself out as a consultant. From April 1994, through December 1994, HUBBELL received approximately $450,010 in connection with his "consulting" business. He only reported approximately $376,075 of these payments on his federal tax return. WEBSTER L. HUBBELL made zero estimated tax payments to the IRS concerning his 1994 consulting income and zero tax payments with his 1994 return.

16. Approximately 15 clients paid WEBSTER L. HUBBELL consulting income in 1994. The fees ranged between $5,000 and $100,000. WEBSTER L. HUBBELL performed little or no work for some of these payments. The payors of these fees included Hong Kong China Limited ($100,000), Revlon ($62,775), and others.

17. In or about September 1994, the Office of the Independent Counsel notified WEBSTER L. HUBBELL that it could prove HUBBELL had intentionally falsely billed in excess of $350,000 to the Rose Law Firm and/or certain of its clients. The Office of the Independent Counsel further advised WEBSTER L. HUBBELL that his anticipated additional tax liability for 1989-1992 would be substantial and in excess of $100,000.

18. On December 6, 1994, WEBSTER L. HUBBELL pled guilty to a two-count Criminal Information filed in

the United States District Court for the Eastern District of Arkansas in Little Rock, Arkansas, charging him with one count of willful tax evasion for 1992 and one count of mail fraud concerning the fraudulent billing of approximately $394,000 between 1989-1992, and the failure to include that money as income. *United States v. WEBSTER HUBBELL*, No. LR-CR-94-241, United States District Court, Eastern District of Arkansas, Western Division.

19. In or about December 1994 through January 1995, WEBSTER L. HUBBELL and MICHAEL C. SCHAUFELE executed three trust agreements designating SCHAUFELE as trustee. MICHAEL C. SCHAUFELE was a resident of Little Rock, Arkansas, a Certified Public Accountant (CPA), and a partner at L. Cotton Thomas & Company. SCHAUFELE was a long-time friend of WEBSTER L. HUBBELL.

a. The first trust agreement, executed on or about December 30, 1994, was titled the Webster Hubbell Legal Expense Trust.

b. The second trust agreement, executed on or about January 19, 1995, was titled the Hubbell Children's Education Trust.

c. The third trust agreement, executed on or about January 19, 1995, was titled the Hubbell Family Support Trust.

20. On or about January 24, 1995, MICHAEL C. SCHAUFELE opened three non-interest bearing bank accounts at Metropolitan National Bank, Little Rock, Arkansas.

a. One account was styled, "WEBSTER HUBBELL Legal Expense Trust, MICHAEL C. SCHAUFELE, Trustee."

b. A second account was styled, "HUBBELL Children's Education Trust, MICHAEL C. SCHAUFELE Trustee."

c. A third account was styled "HUBBELL Family Support Trust . . . MICHAEL C. SCHAUFELE Trustee."

21. The signatories on these accounts were SCHAUFELE and his secretary. In some instances, SCHAUFELE transferred funds into his interest-bearing account.

22. Under the terms of the Children's Education Trust agreement, money contributed to the trust was to be used for the HUBBELL children's education. In some instances, funds were transferred from the Education Trust account to another account SCHAUFELE opened in 1996, and were then spent on living expenses for WEBSTER L. and SUZANNA W. HUBBELL.

23. On June 28, 1995, HUBBELL was sentenced on his two-count Criminal Information by the Honorable George Howard, Jr., Senior Judge, United States District Court, Eastern District of Arkansas, to 21 months' incarceration.

24. Prior to reporting to federal prison, WEBSTER L. HUBBELL wrote a handwritten sheet which purported to list all of his consulting income by client when in fact it only listed some of his income. The sheet also listed purported business expenses. HUBBELL failed to include income received from five clients, which totaled approximately $74,000. WEBSTER L. HUBBELL provided this hand-written sheet to MICHAEL C. SCHAUFELE for SCHAUFELE's use in preparing WEBSTER L. and SUZANNA W. HUBBELL's 1994 joint individual income tax return, Form 1040. SCHAUFELE had prepared the HUBBELLs' tax returns for a number of years.

25. In or about August 1995, pursuant to the obligations of the Plea Agreement, WEBSTER L. HUBBELL filed, and caused to be filed, Amended U.S. Individual Income Tax Returns for the years 1989-1992.

26. As reported on the amended federal returns, the unreported income from HUBBELL's embezzlement resulted in additional tax, exclusive of interest and penalties of,

1989 — $25,403.00;

1990 — $37,552.00;

1991 — $66,529.00; and,

1992 — $48,476.00.

Total — $177,960.00.

27. The HUBBELLs made no tax payments with the amended federal tax returns, despite having substantial cash available.

28. On or about August 7, 1995, WEBSTER L. HUBBELL reported to the Federal Correctional Institution in Cumberland, Maryland to begin serving his sentence.

29. On or about October 2, 1995, WEBSTER L. HUBBELL caused SCHAUFELE to prepare and file Amended Arkansas tax returns for 1989, 1990, 1991, 1992, and a nonresident Arkansas tax return for 1994.

The returns reported additional tax due of:

1989 — $ 5,503,

1990 — $ 8,322,

1991 — $14,753,

1992 — $10,510, and

1994 — $ 1,742

Total — $40,830.

The HUBBELLs did not make any payments on these additional tax liabilities.

30. On or about October 18, 1995, WEBSTER L. HUBBELL filed, and caused to be filed, a false and fraudulent joint U.S. Individual Income Tax Return, Form 1040, for the calendar year 1994. The return was signed by SUZANNA W. HUBBELL on behalf of WEBSTER L. HUBBELL and herself. This tax return reported Schedule C gross income from WEBSTER L. HUBBELL's "consulting" business of $376,075. This Schedule C tax return failed to report "consulting" income from certain clients of approximately $74,000. This Schedule C and tax return also overstated certain business expenses by claiming as business expenses certain personal travel expenses for HUBBELL's wife and children to various locations including Greece and the Gulf Coast of Florida.

31. WEBSTER L. and SUZANNA W. HUBBELL reported total tax on the 1994 return of $141,432. The HUBBELLs made no tax payments with the tax return. The only tax applied to the 1994 return was $1,434 withheld from the W-2 wages of SUZANNA W. HUBBELL at the United States Department of the Interior, $7,111 withheld from the W-2 wages of WEBSTER L. HUBBELL at the Department of Justice prior to his April 1994 resignation, and $577 withheld from a gross distribution of the Thrift Savings Plan of WEBSTER L. HUBBELL, for a total of $9,122. WEBSTER L. and SUZANNA W. HUBBELL made no estimated or any other tax payments toward their joint 1994 additional tax due and owing of $136,345.

32. In order to extend the filing deadline for the 1994 federal tax return beyond April 15, 1995, SCHAUFELE's accounting firm filed an extension application, Form 4868. The extension application listed the estimated tax liability as $40,000. The HUBBELLs did not include the required payment with the extension application. The extension expired on August 15, 1995. The HUBBELLs filed their 1994 return on or about October 18, 1995.

33. The HUBBELLs made no estimated payments on their 1994 tax liability, did not make any payments when they applied for extensions, and did not include any payments when they actually filed the 1994 return. WEBSTER L. and SUZANNA W. HUBBELL received substantial income during 1994 and 1995 from which they could have made payments to the Internal Revenue Service to reduce their 1989-1992 and 1994 tax liabilities.

1994 INCOME

34. During 1994, the HUBBELLs received income from several sources.

a. WEBSTER L. HUBBELL received gross income (before expenses) in 1994 from "consulting" totaling approximately $450,010.00. The consulting income derived from 15 sources, including, but not limited to,

1. Hong Kong China Limited (Riady)—$100,000.00,

2. Revlon — $62,775.00.

WEBSTER L. HUBBELL's net consulting income was approximately $405,919.95.

b. WEBSTER L. HUBBELL also received income from the withdrawal of pension and annuity funds from the ROSE LAW FIRM of approximately $41,886.00 in 1994.

c. WEBSTER L. HUBBELL also received wages in 1994 from the Department of Justice prior to his resignation of $39,634.00.

d. WEBSTER L. HUBBELL also received 1994 interest income of $13,099.00 and dividend income of $20.00.

e. WEBSTER L. HUBBELL also received capital gains in 1994 of approximately $16,957.00.

f. SUZANNA W. HUBBELL received wages from the Department of the Interior in 1994 of $13,899.00.

The HUBBELLs' total 1994 income was approximately $531,414.95.

1995 INCOME

35. During 1995, the HUBBELLs received income from several sources.

a. WEBSTER L. HUBBELL received consulting and book income, after expenses, in 1995 of approximately $95,175.00.

b. WEBSTER L. HUBBELL received pension and annuity income in 1995 of $184,311.00.

c. WEBSTER L. HUBBELL received capital gain and interest income in 1995 from the payoff of an installment sale of a warehouse of approximately $83,128.26.

d. SUZANNA W. HUBBELL received wages in 1995 of $46,988. The HUBBELLs' total 1995 income was $409,602.26.

36. During 1995, the HUBBELLs again made no estimated tax payments on their 1995 anticipated tax liability, and made no tax payment when they filed their return. The HUBBELLs also made no payments to reduce their 1989-1992 and 1994 federal tax liabilities.

37. Commencing in or about November 1995, the Internal Revenue Service began sending notices regarding the HUBBELLs' tax liabilities. For example:

a. On or about November 20, 1995, the Internal Revenue Service sent a notice regarding the 1994 return and the failure to make any payments on the tax liability (including interest and penalty) of $167,562.80.

b. On or about December 11, 1995, the Internal Revenue Service sent notices regarding the 1989, 1990, 1991, and 1992 tax liabilities.

c. In or about January 1996, notices of intent to levy were sent regarding 1989-1992 taxes, interest, and penalties: 1992—$107,927.23; 1991—$156,416.96; 1990—$98,028.18; and 1989—$74,415.90.

38. In or about February 1996, the HUBBELLs received a notice concerning the tax liability the HUBBELLs owed to the District of Columbia for the year 1994, in the amount of $40,033.60. The District of Columbia notice was also provided to SCHAUFELE who then provided a copy to CHARLES C. OWEN. OWEN was an attorney in Little Rock, Arkansas, and was a long-time friend of WEBSTER L. HUBBELL.

39. In or about early February 1996, the HUBBELLs, OWEN and SCHAUFELE executed a Power of Attorney to represent the HUBBELLs with respect to their outstanding tax liabilities.

40 a. Because the defendants were concerned about the HUBBELLs' bank accounts being frozen or SUZANNA W. HUBBELL's wages being garnished, on or about February 8, 1996 OWEN contacted the William Morris Agency and requested on behalf of the HUB-

BELLs that William Morris Agency establish an escrow account for an upcoming payment that was to be made to WEBSTER L. HUBBELL pursuant to a book contract he had entered into with Harper Collins Publishers dated September 28, 1995. OWEN and the HUBBELLs requested that William Morris Agency put the book advance money into an interest-bearing account and disburse the funds only at the direction of WEBSTER L. or SUZANNA W. HUBBELL. OWEN confirmed this request by a letter dated February 15, 1996. William Morris Agency did not agree to set up the requested escrow account.

40 b. On February 26, 1996, the IRS recorded a Notice of Federal Tax Lien in Washington, D.C. The Notice was for an unpaid balance of $105,664.94 for the HUBBELLs' 1992 tax liability.

41 a. In or about April 1994, John Phillips, a friend of WEBSTER L. HUBBELL's recommended that the Consumer Support and Education Fund (CSEF) hire HUBBELL to write a series of articles on public service, for which HUBBELL was to be paid $45,000. HUBBELL received the $45,000, but did not write the articles. After HUBBELL pled guilty in December 1994, he continued to represent to CSEF that he would complete the articles. By December 1995, HUBBELL still had not written the articles. Phillips, the founder of CSEF, decided to reimburse CSEF the $45,000. HUBBELL then volunteered to repay Phillips, and made a $10,000 payment to Phillips in January 1996.

41 b. In or about February 1996, WEBSTER L. HUBBELL provided Phillips a promissory note in the amount of $45,000 and a security agreement. CHARLES C. OWEN drafted the note and agreement and SUZANNA

W. HUBBELL signed it as attorney-in-fact for WEBSTER L. HUBBELL. The security agreement provided that certain specified pieces of the HUBBELLs' art collection, valued at approximately $40,000, would secure the promissory note. The security agreement had the effect of encumbering the art collection and subordinating the interest that the IRS and other creditors, such as the State of Arkansas and the District of Columbia, had in the art collection, to the interest of Phillips. Even though the promissory note and agreement were dated December 14, 1995, they were not prepared, executed and filed until February 1996.

42. On or about March 26, 1996, WEBSTER L. and SUZANNA W. HUBBELL entered into a contract in the amount of $613,000.00 to sell their personal residence located at 3843 Macomb Street, Northwest, Washington, D.C.

43. On or about April 14, 1996, WEBSTER L. and SUZANNA W. HUBBELL filed their 1995 joint U.S. Individual Income Tax Return which was prepared by MICHAEL C. SCHAUFELE. The return was signed by SUZANNA W. HUBBELL on behalf of WEBSTER L. HUBBELL and herself. This return failed to report capital gains and interest income from the installment sale of a warehouse the HUBBELLs owned in Little Rock. WEBSTER L. and SUZANNA W. HUBBELL made no tax payment with the tax return, which reported a tax due and owing of $112,281.00. The unreported income from the warehouse sale would have caused the tax due and owing with the 1995 return to be substantially greater than $112,281.00.

44. After OWEN was unsuccessful in persuading the William Morris Agency to open an escrow account (as

described above in Paragraph 40), on or about May 28, 1996, MICHAEL C. SCHAUFELE opened a non-interest-bearing checking account at the Pulaski County Bank in Little Rock, Arkansas. This non-interest-bearing account did not generate a Form 1099, a copy of which would be sent to the IRS. The account was opened in the name, "MIKE C. SCHAUFELE for the benefit of WEBB and SUZY HUBBELL," (hereinafter referred to as the FBO [For the Benefit Of] account), Post Office Box 1126, Little Rock, Arkansas 72203. The opening deposit into the account was an $18,000 book advance check from William Morris Agency, Inc. and Harper Collins Publishers, payable to WEBSTER L. HUBBELL. The only signatory on the account was MICHAEL C. SCHAUFELE. This account was opened and used to impede and impair various entities, including the Internal Revenue Service from collecting monies owed by concealing funds available to the HUBBELLs. In some instances, funds that had been deposited into the HUBBELL Children's Education Trust were transferred into the FBO account and spent by or made available by SCHAUFELE for the benefit of WEBSTER L. and SUZANNA W. HUBBELL.

45. In or about May 1996, OWEN contacted an Internal Revenue Service Officer in the Washington, D.C., office of the Internal Revenue Service to discuss the HUBBELLs' outstanding federal tax liabilities. OWEN agreed to provide the officer with a copy of the 1995 Federal tax return and work with SUZANNA W. HUBBELL to complete a Collection Information Statement Form 433-A.

46. In or about May 1996, the Internal Revenue Service (IRS) sent OWEN a summary of the federal taxes owed by the HUBBELLs for the years 1989, 1990, 1991, 1992, 1994, and 1995. As of May 1996, the amounts owed were as follows:

47.

Tax Year	Tax and Penalty	Tax, Penalty and Interest as of 5/20/96
1989	$ 43,878.48	$ 78,555.03
1990	$ 65,984.50	$103,898.16
1991	$115,972.75	$166,143.72
1992	$ 85,346.86	$112,428.83
1994	$154,206.85	$184,433.53
1995	$112,281.00	$115,663.88
TOTAL	$577,670.44	$761,123.15

48. On or about August 7, 1996, the IRS recorded a lien against the HUBBELLs in Washington, D.C. for the years 1989, 1990, 1991, 1994, and 1995 in the amount of $607,629.73.

49. On or about August 12, 1996, SUZANNA W. HUBBELL signed and filed a IRS Collection Information Statement (Form 433-A) which purported to list financial information including income, assets and liabilities. SUZANNA W. HUBBELL was assisted in preparing this form by CHARLES OWEN. This form reported equity in assets of $12,758 and liabilities of $1,696,869.

50. The Form 433-A failed to disclose the existence of certain bank accounts including:

a. Account No. *2009927* at Pulaski County Bank titled "MIKE C. SCHAUFELE For the Benefit of WEBB and SUZY HUBBELL." SCHAUFELE was the signature authority on the account.

b. Account No. *1542842* at Metropolitan National Bank. That account was styled "HUBBELL Children's Education Trust, MIKE C. SCHAUFELE Trustee." SCHAUFELE and his secretary were the signature authorities on the account.

c. Account No. *1542834* at Metropolitan National Bank. That account was titled "HUBBELL Family Support Trust . . . MIKE C. SCHAUFELE Trustee."

SCHAUFELE and his secretary were the signature authorities on the account.

51. The Form 433-A also required SUZANNA W. HUBBELL to identify whether she or WEBSTER L. HUBBELL were a, "participant or beneficiary to trust, estate, profit sharing, etc. . . ." SUZANNA W. HUBBELL answered no to that question when, in fact, she and WEBSTER L. HUBBELL did participate in and benefit from certain accounts and trusts which she did not report on the Form 433-A.

52. In or about October through November 1996, the HUBBELLs caused a joint Amended U.S. Individual Income Tax Return, Form 1040X, for 1994, to be prepared and filed with the IRS. This return was prepared by Capital Accounting, a Washington, D.C. accounting firm.

53. The Schedule C attached to the amended return reported additional income from WEBSTER L. HUBBELL's "consulting" business of approximately $77,000 for a new total of $453,075. This additional income came from five clients which HUBBELL did not report on the original 1994 tax return. This unreported income was not reflected on Forms 1099 that were filed with the IRS. The new Schedule C continued to falsely and fraudulently claim approximately $10,000 in personal travel expenses for family members which the HUBBELLs claimed as business expenses.

54. This amended return was prepared and filed after WEBSTER L. HUBBELL was subpoenaed by the Office of Independent Counsel for certain records related to income from his "consulting" business, and after HUBBELL was questioned about his consulting clients by a United States Senate Committee.

55. In or about late October 1996, in settlement of a lawsuit that the Rose Law Firm brought against WEB-

STER L. HUBBELL, HUBBELL entered into an agreement to pay the Firm restitution for funds he had stolen from the Firm and/or certain clients. WEBSTER L. HUBBELL agreed to make certain payments to the Firm. He also agreed that if he earned any gross income in excess of $100,000 minus certain tax payments, per year, to pay 50% of such income to the Rose Law Firm until he satisfied his restitution obligation. SUZANNA W. HUBBELL's income was excluded in the calculation of WEBSTER L. HUBBELL's gross income.

56 a. In or about November through December 1996, following his release from incarceration, WEBSTER L. HUBBELL renewed his efforts to obtain a book contract.

56 b. In or about November 1996, the District of Columbia notified the HUBBELLs that they owed taxes to the District in the following amounts:

TAXES, PENALTIES AND INTEREST OWED

Tax Year	Tax	Tax, Interest, and Penalty
1994	$30,560.00	$44,617.60
1995	$20,836.00	$28,545.32
TOTAL	$51,396.00	$73,162.92

57. On or about March 13, 1997, CHARLES OWEN prepared and filed with the State of Arkansas, Articles of Organization for a company entitled Bridgeport Group, LLC. According to Bridgeport's Operating Agreement, WEBSTER L. HUBBELL had a 49% ownership interest, SUZANNA W. HUBBELL had a 49% ownership interest, and the Children's Trust had a 2% ownership interest. MICHAEL C. SCHAUFELE was listed as the "managing member."

58. On or about April 15, 1997, the HUBBELLs filed a U.S. Joint Individual Income Tax Return, Form 1040, for 1996. SCHAUFELE prepared the 1996 tax return.

The HUBBELLs omitted $18,000 in income the William Morris Agency paid WEBSTER L. HUBBELL. The payment was an advance for a book contract WEBSTER L. HUBBELL entered into with Harper Collins. SCHAUFELE deposited the $18,000 into the FBO bank account SCHAUFELE set up for the benefit of the HUBBELLs.

59. In or about June 1997, WEBSTER L. HUBBELL, through Bridgeport, entered into a book contract with the William Morrow and Company, Inc., a book publisher. Though HUBBELL appeared to have only a 49% ownership interest in Bridgeport, in fact, HUBBELL acknowledged to William Morrow that he owned and controlled Bridgeport.

60. Under the terms of the agreement, Morrow agreed to pay a $400,000 advance, which WEBSTER L. HUBBELL agreed to split evenly with his ghostwriter. The agreement provided for three installment payments: $150,000 upon the signing the agreement; $150,000 upon completion of the manuscript; and $100,000 upon the book's publication.

61. On or about June 17, 1997, Bridgeport received a check for $49,500. This amount represented WEBSTER L. HUBBELL's share of the first installment of the advance after expenses and payments to prior publishers were deducted.

62. On or about June 19, 1997, a bank account was opened at Pulaski Bank, Account No. 3058662, in the name of Bridgeport Group, LLC. MICHAEL C. SCHAUFELE and his secretary had signature authority on this account. Also on June 19, 1997, the check for $49,500 was deposited into the account. The defendant used Bridgeport and its bank account in an attempt to conceal certain financial transactions to impede and impair the

IRS and other creditors. Further, WEBSTER L. HUBBELL made no estimated tax payments with this money. The HUBBELLs were able to spend the book advance before the IRS could discover the location of the funds.

63. As of July 1997, the HUBBELLs owed taxes, interest and penalties to the District of Columbia in the following approximate amounts:

TAXES, PENALTIES AND INTEREST OWED

Tax Year	Tax	Tax, Interest, and Penalty
1994	$30,560.00	$47,826.40
1995	$20,836.00	$31,045.64
TOTAL	$51,396.00	$78,872.04

64. In or about February 1997, the State of Arkansas notified the HUBBELLs that they owed state taxes with interest for the tax year 1994. In or about October 1997, the State of Arkansas notified the HUBBELLs that they owed state taxes with interest for the tax years 1989 through 1993.

The relevant amounts of taxes and interest are as follows:

Tax Year	Tax	Tax with Interest
1989	$ 4,762.30	$ 7,789.67
1990	$ 8,322.00	$12,067.99
1991	$14,753.00	$19,912.48
1992	$10,510.00	$13,138.90
1994	$ 1,759.00	$ 2,032.73
TOTAL	$40,106.30	$54,941.77

65. As of the Fall 1997, the HUBBELLs owed Federal, State and District taxes, interest and penalties of approximately the following:

Federal [1989, 1990, 1991, 1992, 1994, 1995]	$761,123.15
State [1989, 1990, 1991, 1992, 1994]	$ 54,941.77
District [1994, 1995]	$ 78,872.04
Total:	$894,936.96

MONEY EARNED

66. From January 1994 through December 1997, the HUBBELLs received in excess of one million dollars in income. During this same time period, the HUBBELLs were credited with withholding and payments for the years 1989-1992, 1994, and 1995, totaling approximately $23,055.07 to the IRS, $2,516.71 to the State of Arkansas and $4,367.19 to the District of Columbia. Their outstanding tax liabilities for these same years, after credit for these payments, totaled in excess of $500,000. Their total liabilities, including taxes, interest and penalties for these same years totaled in excess of $894,000.

PURCHASES

67. During 1994 through 1997, the HUBBELLs used approximately 20 credit cards to purchase goods and services. These cards included among others American Express Gold, Platinum, and Optima cards, Nordstrom, Ann Taylor, Bloomingdales, Dillards, Lord & Taylor, and Saks.

68. During the years 1994-1997 the HUBBELLs made personal (non-business) purchases by check and credit card of approximately $750,000. During this same period they also made substantial payments on their personal debt.

69 a. Payments for these purchases during 1994-1997 included, but were not limited to, clothing and accessory purchases of approximately $85,000; private school tuition payments of approximately $95,000 (some payments for which were made from funds provided by WEBSTER L. HUBBELL's sister and James Riady to the education trust); telephone charges of approximately $20,000; laundry and dry-cleaning payments of approximately

$10,000; purchases from Ace Beverage of approximately $11,500 (in addition to grocery purchases); beauty salon payments of approximately $5,000; and domestic help payments of approximately $9,900.

69 b. During this same period, currency withdrawals were made from the HUBBELLs' accounts in excess of $60,000.

INCOME FROM IRA ACCOUNT WITHDRAWALS

70. From in or about February 1994 continuing through October 1995, WEBSTER L. HUBBELL made numerous withdrawals from his Individual Retirement Account (IRA) at Worthen Bank. These withdrawals totaled approximately $223,310.58.

71. A person who makes a premature withdrawal from an IRA is subject to an early withdrawal penalty. All withdrawals, whenever made, are subject to having 20% of the withdrawal amount withheld to offset federal taxes. The 20% is automatically withheld unless the account holder signs a written statement requesting that there be no withholding. The written request HUBBELL signed at Worthen Bank notified him that, "[Y]ou are liable for payment of the same taxable portion of your distribution. You may be subject to tax penalties under the estimated tax payment rules if your payments of estimated tax and withholding, if any, are not adequate."

72. In every instance of an IRA withdrawal, WEBSTER L. HUBBELL filled out and signed or caused MICHAEL C. SCHAUFELE to fill out and sign a document in which he expressly elected to withdraw all the funds without having taxes withheld to pay over to the IRS.

73. The withdrawals and elections included the following:

	DATE of Withdrawal Request	AMOUNT
1.	1/23/94	$19,000.00
2.	3/16/94	$20,000.00
3.	1/20/95	$30,000.00
4.	5/1/95	$50,000.00
5.	6/8/95	$65,000.00
6.	7/12/95	$ 2,414.32
7.	8/9/95 (date received)	$ 7,829.91
8.	10/12/95	$29,066.35
	TOTAL	$223,310.58

PENSION ACCOUNT CHECK SWAP

74. The last withdrawal from WEBSTER L. HUBBELL's IRA at Worthen Bank of $29,066.35 in October, 1995, actually involved a transaction with HUBBELL's pension plan at the Rose Law Firm.

75. As do many businesses, the Rose Law Firm (RLF) operated a pension plan for the benefit of its employees. WEBSTER L. HUBBELL contributed to the pension plan at RLF when he worked there.

76. Similar to the rules for an IRA, pension plan withdrawals were subject to a 20% withholding to offset federal income taxes. Unlike an IRA, however, withholding on premature pension plan withdrawals was *mandatory*. One could *not* elect to simply defer the taxes until the return was filed. An individual *could*, however, roll over pension funds *into* an IRA without any withholding.

77. During the time he worked at the RLF, WEBSTER L. HUBBELL borrowed against (from) his profit sharing/pension plan.

78. In or about August 1995, the RLF, notified WEBSTER L. HUBBELL that he was in default on three outstanding loans he had from the RLF's profit sharing plan. The outstanding balance owed, including interest, was approximately $29,066.35. If WEBSTER L. HUBBELL did not become current on the loans or did not pay off the loans, the RLF would declare the loan in default, which would result in a taxable distribution to WEBSTER L. HUBBELL. Because of the mandatory 20% withholding requirement, WEBSTER L. HUBBELL would not only have income of $29,066.35, he would also be required to pay the pension plan 20% of the amount which in turn would be paid to the IRS for withholding.

79. On or about August through October 1995, MICHAEL C. SCHAUFELE devised a plan, in which WEBSTER L. HUBBELL assisted, to cancel WEBSTER L. HUBBELL's debt owed to the RLF without paying any withholding to the IRS. SCHAUFELE was able to accomplish this transaction by "proposing that we swap checks." The check swap worked as follows.

80. On or about October 10, 1995, SCHAUFELE provided three checks to the RLF drawn on WEBSTER L. HUBBELL's checking account at Worthen Bank (now NationsBank) totaling $29,065.35 to pay off the past due debt. At the time SCHAUFELE provided the checks, there were insufficient funds in WEBSTER L. HUBBELL's Worthen account to cover the checks.

81. SCHAUFELE then persuaded an individual at the RLF that, in order for the RLF to receive payment, the RLF had to hold these checks and not immediately deposit them until SCHAUFELE could deposit funds to cover them, funds he would receive ultimately from the RLF profit sharing/pension plan account.

82. The RLF then, at SCHAUFELE's request, directed that a check be issued from the RLF's profit sharing plan clearing account for $29,066.35 to be paid to WEBSTER L. HUBBELL's IRA account at Worthen. Since the transfer was from the pension plan to HUBBELL's IRA, no withholding was required.

83. SCHAUFELE then immediately caused the IRA to transfer $29,066.35 to WEBSTER L. HUBBELL's personal account at Worthen. SCHAUFELE signed the election as WEBSTER L. HUBBELL's power of attorney to have no withholding from the IRA.

84. The $29,066.35 was used to cover the three checks drawn on WEBSTER L. HUBBELL's personal account that were given earlier in the day to the RLF. SCHAUFELE then notified the RLF to deposit the three checks into its clearing account to cover the check previously issued on that account. The purpose of SCHAUFELE and WEBSTER L. HUBBELL in structuring the transaction in this fashion was so that WEBSTER L. HUBBELL did not have to pay the IRS 20% withholding. The individual at the RLF was willing to accommodate this transaction in order to end the RLF's dealings with WEBSTER L. HUBBELL on this matter.

Conclusion

85. a. In January 1994, WEBSTER L. HUBBELL and SUZANNA W. HUBBELL had approximately $223,000 in an IRA and pension plan, a coin and art collection, and equity in a house and warehouse. Between 1994 and 1996 they earned over a million dollars. By the end of 1997, the HUBBELLs had liquidated all of those assets and spent virtually all their money.

85. b. As of December 31, 1997, the HUBBELLs owed the IRS (for the years 1989-1992, 1994 and 1995),

the State of Arkansas (for the years 1989-1992 and 1994) and the District of Columbia (for the years 1994 and 1995) over $895,000 and had not made any further payments to reduce those years' liabilities.

COUNT 1

(Conspiracy)

THE GRAND JURY FURTHER CHARGES THAT:

86. From in or about Spring 1994, the exact date being unknown to the grand jury, continuing to in or about January 1998, in the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN

Defendants,

knowingly, willfully and unlawfully conspired, confederated and agreed with each other and with other persons to commit the following offenses:

(1) to willfully, knowingly, and unlawfully defraud the United States, and an agency thereof, by impeding, impairing, obstructing, and defeating the lawful functions of the United States Department of the Treasury, Internal Revenue Service, in the ascertainment, computation, and collection of the revenue;

(2) to willfully attempt to evade or defeat a tax due and owing to the United States, in violation of Title 26 United States Code, Section 7201;

(3) to knowingly and willfully devise, and intend to devise, a scheme and artifice to defraud: the State of Arkansas of taxes, interest, and penalties; the District of Columbia of taxes, interest, and penalties; and the Rose Law Firm of Little Rock, Arkansas, of money in connection with a Settlement Agreement entered into in October 1996 and the creation and use of Bridgeport Group, LLC; by means of false and fraudulent pretenses, representations and promises, and by means of the United States mail carriers, in violation of Title 18, United States Code, Section 1341; and

(4) to knowingly and willfully devise, and intend to devise, a scheme and artifice to defraud: the State of Arkansas of taxes, interest, and penalties; the District of Columbia of taxes, interest, and penalties; and the Rose Law Firm of Little Rock, Arkansas, of money in connection with a Settlement Agreement entered into in October 1996 and the creation and use of Bridgeport Group, LLC; by means of false and fraudulent pretenses, representations and promises, and by means of wire transmissions in interstate commerce, in violation of Title 18, United States Code, Section 1343.

WAYS, MANNER AND MEANS

87. It was a part of the conspiracy that certain actions were taken as follows:

(1) The defendants, through various means, attempted to obstruct, impede and impair the lawful functions of the Internal Revenue Service in its attempts to determine the HUBBELLs' true income and taxes for certain years and to collect those taxes due.

(2) The defendants attempted to evade the payment of hundreds of thousands of dollars in taxes, interest and penalties that the HUBBELLs owed to the United States.

(3) False and fraudulent U.S. Individual Income Tax Returns for WEBSTER L. HUBBELL and SUZANNA W. HUBBELL were prepared, signed and filed with the Internal Revenue Service.

(4) The defendants attempted to defraud the State of Arkansas and the District of Columbia out of income taxes owed by the HUBBELLs.

(5) The defendants attempted to defraud the Rose Law Firm out of money owed to the Firm as a result of WEBSTER L. HUBBELL's embezzlement, which the Firm attempted to recover through a Settlement Agreement entered into with WEBSTER L. HUBBELL in or about October 1996.

(6) Certain bank accounts were created and used to conceal funds from the Internal Revenue Service and other creditors and to impede the Internal Revenue Service's and other creditors' ability to locate funds and assets owned or controlled by the HUBBELLs.

(7) Certain financial transactions were structured and orchestrated so that the HUBBELLs' income taxes would not be withheld and paid over to the Internal Revenue Service. These transactions included withdrawals from a pension plan and an Individual Retirement Account (IRA) without any taxes being withheld.

(8) Bridgeport Group, LLC, was created and used to impede the Internal Revenue Service and other creditors. WEBSTER L. HUBBELL was listed as less than a 50% owner when, in fact, he controlled the company. Similarly, a bank account was created in Bridgeport's name

with persons other than WEBSTER L. HUBBELL as signatory to further impede the IRS and others.

(9) The HUBBELLs liquidated assets and spent funds, while at the same time failing to make tax payments to the Internal Revenue Service, the State of Arkansas, and the District of Columbia. The result was that the HUBBELLs spent substantial funds on personal items to the detriment of these Government entities.

(10) Certain financial records relating to the HUBBELLs were subpoenaed from SCHAUFELE by a federal grand jury, which were not produced to the grand jury at the time called for.

(11) Further, the defendants took various actions to conceal the objectives of the conspiracy.

88. The factual allegations in Introductory Paragraphs 1-85 are realleged and incorporated by reference into Count 1 as further describing the Ways, Manner, and Means of the conspiracy.

OVERT ACTS

89. In furtherance of the conspiracy and to effect the objects of the conspiracy, the following overt acts, among others, were committed in the District of Columbia and elsewhere:

90. The factual allegations in paragraphs 19-22, 24-25, 30, 32, 40, 41b, 43-44, 49, 51, 52, 57-59, 61, 62, 69, 73 (2-8), 80-84 are reallaged as separate overt acts in furtherance of the conspiracy.

(In violation of 18 U.S.C. § 371)

COUNT 2

(Impede and Impair IRS)

THE GRAND JURY FURTHER CHARGES THAT:

91. Beginning in or about Spring 1994, the exact date being unknown to the grand jury, and continuing through in or about January 1998, in the District of Columbia, and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

did corruptly endeavor, and aid and abet to endeavor, to obstruct and impede the due administration of the revenue laws as further described below.

92. The factual allegations in Introductory Paragraphs 1-85, and 87(1)-(11) are realleged and incorporated by reference into Count 2 as further describing the endeavor to obstruct and impede the due administration of the revenue laws.

(In violation of 26 U.S.C. § 7212(a))

COUNT 3

(Tax Evasion)

THE GRAND JURY FURTHER CHARGES THAT:

93. Beginning in or about Spring 1994, the exact date being unknown to the grand jury, and continuing through in or about January 1998, in the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

did willfully attempt to evade and defeat the payment of a large part of the income tax due and owing by WEBSTER L. and SUZANNA W. HUBBELL for the calendar years 1989, 1990, 1991, 1992, 1994 and 1995, by engaging in conduct the likely effect of which was to mislead and conceal information from the IRS, as further described below.

94. Introductory paragraphs 1-85, and the factual allegations in Count 1, paragraph 87(1)-(11), are realleged and incorporated by reference into Count 3 as further describing the attempt to evade and defeat the payment of income taxes.

(In violation of 26 U.S.C. § 7201)

COUNT 4

(Aid in Preparing A False Return)

THE GRAND JURY FURTHER CHARGES THAT:

95. The factual allegations contained in Introductory paragraphs 1-16, 24, 30, 31, 32, 34, and 41 of this Indictment are realleged as though fully set forth herein.

96. On or about October 4, 1995, within the District of Columbia and elsewhere,

WEBSTER L. HUBBELL, Defendant,

did willfully aid and assist in, procure, counsel, and advise the preparation and presentation to the IRS, of a joint U.S. Individual Income Tax Return, Form 1040 for the calendar year 1994, for WEBSTER L. and SUZANNA W. HUBBELL. The return was signed and filed with the Internal Revenue Service. The defendant, WEBSTER L. HUBBELL, did not believe the tax return to be true and correct as to every material matter, in that the return reported on Schedule C, line 1, gross business receipts of $376,075, business travel expenses on Schedule C line 24a of $22,089, business income on Form 1040, line 12 of $321,861, and adjusted gross income on line 31 of $440,637, whereas in truth and in fact, and as the defendant then and there well knew and believed, one or more of the following lines on the tax return were false and fraudulent in that,

1. Schedule C line 1 substantially understated gross receipts,

2. Schedule C line 24a substantially overstated business expenses,

3. Form 1040 line 12 substantially understated business income, and

4. Form 1040 line 31, substantially understated adjusted gross income.

(In violation of 26 U.S.C. § 7206(2)).

COUNT 5

(Aid in Preparing a False Tax Return)

THE GRAND JURY FURTHER CHARGES THAT:

97. The factual allegations contained in Introductory paragraphs 35, 36, and 43 of this Indictment are realleged as though fully set forth herein.

98. On or about April 14, 1996, in the District of Columbia and elsewhere,

MICHAEL C. SCHAUFELE, Defendant,

did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service, of a U.S. Individual Income Tax Return, Form 1040, of WEBSTER L. and SUZANNA W. HUBBELL for the calendar year 1995, which return was signed and filed with the IRS, and which return was false and fraudulent as to a material matter, in that on line 8a the return reported interest income of $760, on line 13 the return reported no capital gains, and on line 31 the return reported adjusted gross income of $317,232, whereas in truth and in fact, and as the defendant then and there well knew and believed, one or more of the following lines on the tax return were false and fraudulent in that,

1. line 8a understated interest income,

2. line 13 understated capital gains, and

3. line 31 understated adjusted gross income,

by omitting from the return income received in 1995 from the installment sale of a warehouse to Hamilton Associates.

(In violation of 26 U.S.C. § 7206(2)).

COUNTS 6-10

(Mail Fraud and Wire Fraud)

THE GRAND JURY FURTHER CHARGES THAT:

99. The factual allegations contained in paragraphs 1-85 of this Indictment are realleged as though fully set forth herein.

100. From in or about October 1995, through in or about December 1997, within the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

did knowingly and willfully devise and execute, and attempt to devise and execute, and aid and abet the devising and execution of, a scheme and artifice to defraud the District of Columbia of money and property, that is, approximately $73,162.92 of taxes, penalties, and interest due and owing for the years 1994 and 1995, by means of false and fraudulent pretenses, representations and promises.

MEANS AND METHODS OF THE SCHEME AND ARTIFICE TO DEFRAUD

101. The means and methods of the scheme and artifice to defraud include the same means and methods listed in Count 1, paragraphs 87(7)-(11), of this Indictment. As such, the factual allegations contained in paragraph 87(7)-(11) of Count 1 of this Indictment are realleged as if fully set forth herein.

THE MAILINGS/WIRE TRANSMISSIONS

102. On or about the dates listed below, within the District of Columbia and elsewhere,

WEBSTER L. HUBBELL,

SUZANNA W. HUBBELL,

MICHAEL C. SCHAUFELE, and

CHARLES C. OWEN,

Defendants,

for the purpose of executing, and attempting to execute, and aiding and abetting the execution of the above described scheme and artifice to defraud, knowingly caused the items listed below to be sent and delivered by the United States Postal Service, according to the directions thereon; or caused the transmission by means of a wire (telephone facsimile) communication in interstate commerce the writing, sign, and signal described below:

Count	Date	Wired From	Wired To	Item
6 WIRE FRAUD 18 USC 1343	2/13/96	Michael C. Schaufele 620 West Third St., Suite 400 Little Rock, AR, Fax no. 501-375-6825	Law Firm Fax No. 202-383-6610, Washington, D.C.	Letter and attached Statement of D.C. Income Tax Due

Count	Date	Mailed From	Mailed To	Item
7 Mail Fraud 18 USC 1341	8/15/96	Government of the District of Columbia, 441 4th St., N.W., Washington, D.C.	HUBBELL Residence, 3843 Macomb St NW WASH	Notice of D.C. Tax Due-Income System, for the HUBBELLS for 1995
8 Mail Fraud 18 USC 1341	8/22/96	Government of the District of Columbia, 441 4th St., N.W. Suite 300,	HUBBELL Residence, 3843 Macomb St NW WASH	Notice of Intent to file Lien for 1994

Count	Date	Mailed From	Mailed To	Item
9 Mail Fraud 18 USC 1341	11/27/96	Government of the District of Columbia, 441 4th St., N.W. Suite 300, Washington, D.C.	620 W. 3rd, Little Rock, Arkansas	Notice of District Tax Lien
10 Mail Fraud 18 USC 1341	12/10/96	Government of the District of Columbia, 441 4th St., N.W. Suite 500, Washington, D.C.	HUBBELL Residence, 3843 Macomb St., N.W., Washington, D.C.	Notice of Intent to File Lien

All in violation of Title 18, United States Code, Sections 1343 (Count 6) and 1341 (Counts 7-10), and 2.
A True Bill:

/s/ Illegible
Grand Jury Foreman

/s/ Kenneth W. Starr
KENNETH W. STARR
Independent Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Judge James Robertson

Criminal No. 98-0151 (JR)

UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL, SUZANNA W. HUBBELL, MICHAEL C. SCHAUFELE, and CHARLES C. OWEN,
Defendants.

EXHIBITS TO MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT WEBSTER HUBBELL TO DISMISS OR FOR A *KASTIGAR* HEARING

United States District Court

EASTERN DISTRICT OF ARKANSAS

TO: **Webster Hubbell**

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

☐ PERSON ☑ DOCUMENTS OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	ROOM
Federal Grand Jury U.S. Post Office & Courts Bldg., 4th Floor 600 West Capitol Little Rock, Arkansas	#470
	DATE AND TIME November 19, 1996 9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

See Rider Attachment to Federal Grand Jury Subpoena.

Personal appearance not required if the requested documents are delivered on or before the return date to CI Lee Giannini at the Office of the Independent Counsel, 1701 Centerview Drive, Suite 203, Little Rock, Arkansas 72211, telephone number (501) 221-8700, for submission to the Grand Jury.

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
JAMES W. McCORMACK	October 31, 1996
(BY) DEPUTY CLERK Rebecca Carpenter	#2072

This subpoena is issued upon application of the United States of America

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Independent Counsel
Kenneth W. Starr
Steve Parker, Esq. SP
2 Financial Centre, Suite 134
10825 Financial Centre Parkway
Little Rock, Arkansas 72211 (501) 221-8700

*If not applicable, enter "none."

To be used in lieu of AO110

FORM OBD-279
JAN 96

SUBPOENA RIDER

A. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to the identity of employers or clients of legal or any other type of work.

B. Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell, his wife, or children from January 1, 1993 to the present, including but not limited to billing memoranda, draft statements, bills, final statements, and/or bills for work performed or time billed from January 1, 1993 to the present.

C. Copies of all bank records of Webster Hubbell, his wife, or children for all accounts from January 1, 1993 to the present, including but not limited to all statements, registers and ledgers, cancelled checks, deposit items, and wire transfers.

D. Any and all documents reflecting, referring, or relating to time worked or billed by Webster Hubbell from January 1, 1993 to the present, including but not limited to original time sheets, books, notes, papers, and/or computer records.

E. Any and all documents reflecting, referring, or relating to expenses incurred by and/or disbursements of money by Webster Hubbell during the course of any work performed or to be performed by Mr. Hubbell from January 1, 1993 to the present.

F. Any and all documents reflecting, referring, or relating to Webster Hubbell's schedule of activities, in-

cluding but not limited to any and all calendars, day-timers, time books, appointment books, diaries, records of reverse telephone toll calls, credit card calls, telephone message slips, logs, other telephone records, minutes, databases, electronic mail messages, travel records, itineraries, tickets for transportation of any kind, payments, bills, expense backup documentation, schedules, and/or any other document or database that would disclose Webster Hubbell's activities from January 1, 1993 to the present.

G. Any and all documents reflecting, referring, or relating to any retainer agreements or contracts for employment of Webster Hubbell, his wife, or his children from January 1, 1993 to the present.

H. Any and all tax returns and tax return information, including but not limited to all W-2s, form 1099s, schedules, draft returns, work papers, and backup documents filed, created or held by or on behalf of Webster Hubbell, his wife, his children, and/or any business in which he, his wife, or his children holds or has held an interest, for the tax years 1993 to the present.

I. Any and all documents reflecting, referring, or relating to work performed or to be performed or on behalf of the City of Los Angeles, California, the Los Angeles Department of Airports or any other Los Angeles municipal governmental entity, Mary Leslie, and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail,

bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

J. Any and all documents reflecting, referring, or relating to work performed or to be performed by Webster Hubbell, his wife, or his children on the recommendation, counsel or other influence of Mary Leslie and/or Alan S. Arkatov, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

K. Any and all documents related to work performed or to be performed for or on behalf of Lippo Ltd. (formerly Public Finance (H.K.) Ltd.), the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Luen Wai Lee, John Huang, Mark W. Grobmyer, C. Joseph Giroir, Jr., or any affiliate, subsidiary, or corporation owned or controlled by or related to the aforementioned entities or individuals, including but not limited to correspondence, retainer agreements, contracts, time sheets, appointment calendars, activity calendars, diaries, billing statements, billing memoranda, telephone records, telephone message slips, telephone credit card statements, itineraries, tickets for transportation, payment records, expense receipts, ledgers, check registers, notes, memoranda, electronic mail, bank deposit items, cashier's checks, traveler's checks, wire transfer records and/or other records of financial transactions.

DEFINITIONS AND INSTRUCTIONS

1. *Definitions*

a. The term "document" or "documents" as used in this subpoena means all records of any nature whatsoever within your possession, custody, or control or the possession, custody, or control of any agent, employee representative, or other person acting or purporting to act for or on your behalf or in concert with you, including but not limited to memoranda, records, reports, notes, books, files, summaries or records of conversations, meetings, or interviews, summaries or records of telephone conversations, diaries, calendars, datebooks, telegrams, facsimiles, telexes, telefaxes, electronic mail, computerized records stored in the form of magnetic or electronic coding on computer media or on media capable of being read by computer or with the aid of computer related equipment, including but not limited to floppy disks or diskettes, disks, diskettes, disk packs, fixed hard drives, removable hard disk cartridges, mainframe computers, Bernoulli boxes, optical disks, WORM disks, magneto/optical disks, floptical disks, magnetic tape, tapes, laser disks, video cassettes, CD-ROMs, and any other media capable of storing magnetic coding, microfilm, microfiche and other storage devices, voicemail recordings, and all other written, printed, or recorded or photographic matter or sound reproductions, however produced or reproduced.

The term "document" or "documents" also includes any earlier, preliminary, preparatory, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft and whether or not the terms of the draft are the same as or different from the terms of the final document.

b. The term "communication" or "communications" is used herein in its broadest sense to encompass any transmission or exchange of information, ideas, facts, data, proposals, or any other matter, whether between individuals or between or among the members of a group, whether face-to-face, by telephone, or by means of electronic or other medium.

c. "Possession, custody, or control" means in your physical possession and/or if you have the right to secure or compel the production of the document or a copy from another person or entity having physical possession, including, but not limited to, your counsel or agent.

d. The term "referring or relating" to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject including, but not limited to, documents concerning the preparation of other documents.

2. *Instructions*

a. The originals of all documents and communications must be produced, as well as copies within your possession, custody, or control.

b. If any original document cannot be produced in full, produce such document to the extent possible and indicate specifically the reason for your inability to produce the remainder.

c. Documents shall be produced as they are kept in the usual course of business, as organized in the files.

d. File folders, labels, and indices identifying documents called for shall be produced intact with such documents. Documents attached to each other should not be separated.

e. In reading this rider, the plural shall include the singular and the singular shall include the plural.

f. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The use of the word "including" shall be construed without limitation.

g. In the event that any document, or portion thereof, called for by this subpoena is withheld on the basis of any claim of privilege or similar claim, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c) addressee; (d) the position or title of the addressee; (e) any indicated or blind copies; (f) date; (g) a description of the subject matter of the document; (h) number of pages; (i) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, has been disclosed, distributed, shown, or explained; and (k) present custodian. Each basis you contend justifies the withholding of the document shall also be specified. With respect to those documents or records as to which you may claim privilege, or attorneys' work product, set forth as to each such document the basis for such claim, including the purpose and circumstances surrounding the creation of the document, the identity of each person who has been privy to such communication reflected in the document, the identity of any person or entity instructing the subpoena recipient or the attorney of the subpoena recipient to withhold production of the document, and whether you will submit the document to the Court for an *in camera* determination as to the validity of the claim. If the existence of a joint defense agreement or any agreement as to common interest is relevant to the assertion of any claim of privilege or similar claim, please provide a copy of that agreement; if any such agreement is not in writing, please set

forth the date of the creation of the agreement, the identities of all parties to the agreement and the specific individuals who entered into the agreement on behalf of those parties, and the objects, purposes, and scope of the agreement.

h. In the event that any document called for by this subpoena has been lost, destroyed, deleted, altered, or otherwise disposed of, that document shall be identified in writing as follows: (a) author; (b) the position or title of the author; (c) addressee; (d) the position or title of the addressee; (e) indicated or blind copies; (f) date; (g) a brief description of the subject matter of the document; (h) number of pages; (i) attachments or appendices; (j) all persons to whom the document, its contents, or any portion thereof, had been disclosed, distributed, shown or explained; (k) the date of the loss, destruction, deletion, alteration, or disposal and the circumstances thereof; and (l) the reasons, if any, for the loss, destruction, deletion, alteration, or disposal and the person or persons responsible.

i. If any information or data is withheld because such information or data is stored electronically, it is to be identified by the subject matter of the information or data and the place or places where such information is maintained.

[OIC logo]

OFFICE OF THE INDEPENDENT COUNSEL
1001 Pennsylvania Avenue, N.W.
Suite 490-North
Washington, D.C. 20004
(202) 514-8688

November 8, 1996

By telefacsimile and First Class Mail

John W. Nields, Jr., Esq.
Howrey & Simon
1299 Pennsylvania Avenue, Northwest
Washington, D.C. 20004-2402

Re: *Webster L. Hubbell*

Dear John:

This will follow up on our conversation Wednesday evening, November 6, 1996, concerning Grand Jury Subpoena No. 2072, which seeks certain business, financial and tax records from your client, Webster L. Hubbell.

We have examined the question you posed concerning the precise scope of a grant of immunity directed to the act of producing the subpoenaed documents. You indicated that you interpret the holding in *United States v. Doe*, 465 U.S. 605 (1984), to operate so as to prevent *any* evidentiary use of the documents against Mr. Hubbell. However, *Doe* and its progeny are completely at variance with your view. The Court was very clear in *Doe* in limiting the scope of Fifth Amendment protection, and consequently of use immunity, applicable to the business records involved.

> Respondent argues that any grant of use immunity must cover the contents of the documents as well as the act of production. We find this contention unfounded. To satisfy the requirements of the Fifth Amendment, a grant of immunity need be only as broad as the privilege against self-incrimination. As discussed above, the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records.

465 U.S. at 617 n.17 (citations omitted). Accordingly, the Court held as follows:

> We conclude that the Court of Appeals erred in holding that the contents of the subpoenaed documents were privileged under the Fifth Amendment. The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U.S.C. §§ 6002 and 6003.

Id. at 617. *See also United States v. J.W.O.*, 940 F. 2d 1165, 1166-1167 (8th Cir. 1991) (government need only offer immunity under section 6002 to the act of production in order to obtain individual's subpoenaed business records; challenge to use of evidence obtained through compelled act of production must await post-indictment suppression hearing). We see no meaningful distinction between the circumstances in *Doe* and the subpoena to Mr. Hubbell. Certainly the fact that Mr. Hubbell might contend that some of the subpoenaed records are personal rather than (or as well as) business is of no import. *See In re Grand Jury Subpoena Duces Tecum*, 1 F. 3d 87, 93 (2d Cir. 1993) (collecting cases) (Fifth Amendment does not protect contents of voluntarily prepared business or personal records), *cert. denied*, 114 S. Ct. 920 (1994).

Hence, a grant of immunity here consistent with the *Doe* decision will prohibit the government only from introducing the act of production of documents against Mr. Hubbell. It will not restrict the use of the contents of the documents.

As we have indicated, we are prepared to provide formal, court-ordered act of production immunity, co-extensive with the holding in *Doe*; alternatively, we are prepared to do so by letter. Please notify us by the close of business today how you would like to proceed.

We are looking into the second question you raised—whether we can reconcile the subpoena compliance date with Mr. Hubbell's pending transfer to a halfway house facility. We will get back with you on that issue shortly.

Sincerely,

KENNETH W. STARR
Independent Counsel

By: /s/ John D. Bates
JOHN D. BATES
Deputy Independent Counsel

HOWREY & SIMON

Attorneys at Law
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402
(202) 783-0800

John W. Nields, Jr.
(202) 383-6639

November 12, 1996

BY FACSIMILE

John D. Bates, Esq.
Deputy Independent Counsel
1001 Pennsylvania Avenue, N.W.
Suite 490 - North
Washington, D.C. 20004

Dear John:

I am writing to confirm what I said to you by phone on Friday, and to respond more formally to your letter of November 7, 1996.

The reason why the Fifth Amendment protects compelled production of documents *and other things* is that the subpoenaed party is implicitly forced to say whether the documents or things are in existence and under his control. The fact that there is writing on a document to be produced is not pertinent to the analysis. *See Fisher v. United States*, 425 U.S. 391, 410 (1976). I think we are on common ground so far.

I believe a document or other thing produced under a grant of immunity is the fruit of the compelled act of production. It is evidence "derived from" the testimony implicit in the act of production. On this point I think we disagree.

Courts have not yet resolved which one of us is correct. In the *J.W.O.* case, cited in your letter; in *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir.) (Scalia, J.), *cert. denied sub nom., Wiggins v. United States*, 479 U.S. 924 (1986); in *Matter of Grand Jury Proceeding, Special April 1987*, 890 F.2d 1, 4 (7th Cir. 1989); and in *United States v. Porter*, 711 F.2d 1397, 1403 n.5 (7th Cir. 1983), the courts expressly declined to decide at the subpoena enforcement phase the question whether the document is "tainted" fruit of the compelled testimonial act of production. But I believe language in each of those cases is helpful to my view.

In addition, I believe the immunity *statute* poses a significant barrier to your view. The statute says that when evidence is compelled pursuant to a statutory immunity order "no testimony *or other information* compelled under the order (or *any information directly or indirectly derived* from such testimony or other information)" may be used against the witness. "Information" is a defined term under the immunity statute, and it includes "documents". This too is consistent with my view that the information is the fruit of the act of production.

Since we differ as to the ability of the government to use documents produced under immunity I believe Mr. Hubbell will have to proceed under the statutory immunity route rather than by letter agreement. This will leave each of us in a position to argue later—if necessary—our positions concerning the effect of the statutory immunity.

I should mention one other point. I assume you agree that the government cannot compel production under 18 U.S.C. §§ 6002-3 without giving the full protection provided by the statute. In other words, the government has no power to compel production while giving less protec-

tion than the statute provides—whatever that may be. The statute says the Court *must* issue the immunity order if applied for; the witness must provide the testimony or other information if given an order "under this title"; and the witness then *automatically* receives the protection provided by 18 U.S.C. § 6002. If you disagree with this, please let me know, so that we may try to find a way to resolve the matter before November 19, 1996.

Sincerely,

/s/ John W. Nields, Jr.
JOHN W. NIELDS, JR.

[Filed Nov. 14, 1996]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. GJ-96-3

IN RE: GRAND JURY PROCEEDINGS

ORDER COMPELLING PRODUCTION OF DOCUMENTS

On motion of the United States, and it appearing to the satisfaction of the Court:

1. That Webster L. Hubbell has been subpoenaed to produce certain documents to the Grand Jury;

2. That Webster L. Hubbell has refused to produce said documents to the Grand Jury on the basis of his fifth amendment privilege against self-incrimination;

3. That in the judgment of the Independent Counsel, the production of said documents by Webster L. Hubbell is necessary to the public interest; and

4. That the motion filed herein has been made by the Independent Counsel pursuant to the authority vested in him by 18 U.SC. § 6003 and 28 U.S.C. § 594(a)(7);

NOW, THEREFORE, IT IS ORDERED pursuant to 18 U.S.C. § 6002:

1. That Webster L. Hubbell shall produce any and all documents as described in the Rider appended to Grand Jury Subpoena Duces Tecum Number 2072; returnable on November 19, 1996;

2. That Webster L. Hubbell is granted immunity to the extent allowed by law. *See United States v. Doe*, 465 U.S. 605 (1984) and *United States v. J.W.O.*, 940 F.2d 1165 (8th Cir. 1991).

SO ORDERED this 14 day of November 1996.

/s/ Susan Webber Wright
United States District Judge

BEFORE THE GRAND JURY
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Case Name: MADISON GUARANTY, *et al.*
Witness Name: WEBSTER LEE HUBBELL

BE IT REMEMBERED, that on the 19th day of November, 1996, the above-referenced proceedings came before the Grand Jury for the United States District Court, Eastern District of Arkansas, 600 West Capitol, Little Rock, Arkansas, beginning at 10:31 a.m.

* * * *

[2] (The witness was duly sworn by the Grand Jury Foreman.)

EXAMINATION

BY MR. PARKER:

Q. Could you state your name, please, and spell your last name?

A. My name is Webster Lee Hubbell, H-u-b-b-e-l-l.

Q. Mr. Hubbell, you were served with a Subpoena requesting documents; is that correct?

A. Yes.

Q. And have you brought those documents here today with you.

A. Based on my Fifth Amendment privilege against self-incrimination and on advice of counsel, I decline to state whether there are documents within my possession, custody, or control responsive to the Subpoena.

MR. PARKER: And for the ladies and gentlemen of the Grand Jury, everybody has a right under the Fifth Amendment. You should not ever consider that in this case, that anybody invoke that right, and you should decide this case on the evidence and not take into consideration at all that this gentleman has taken exercised his right under the Fifth Amendment.

Q. [By Mr. Parker:] Now, Mr. Hubbell, I believe you have been advised that the United States approached Judge Susan Webber Wright with a motion and obtained an order [3] compelling production of the documents. At this time, I am going to have the Foreman read you that order. There's a copy in front of you also.

GRAND JURY FOREMAN: Okay. "Grand Jury Proceedings, Order Compelling Production of Documents. On Motion of the United States, and it appearing to be satisfactory of the Court:

"1. That Webster L. Hubbell has been subpoenaed to produce certain documents to the Grand Jury.

"2. That Webster L. Hubbell has refused to produce said documents to the Grand Jury on the basis of his Fifth Amendment privilege against self-incrimination.

"3. That in the judgment of the Independent Counsel, the production of said documents by Webster L. Hubbell is necessary to the public interest; and

"4. That the motion filed herein has been made by the Independent Counsel pursuant to the authority vested in him by 18 U.S.C. 6003 and 28 U.S.C. 594(a)(7);

"Now, therefore, it is ordered pursuant to 18 U.S.C. 6002:

"1. That Webster L. Hubbell shall produce any and all documents as described in the Rider appended to Grand Jury Subpoena Duces Tecum Number 2072; returnable on November 19, 1996;

"2. That Webster L. Hubbell is granted immunity to [4] the extent allowed by law. See United States v. Doe, 465 U.S. 605 (1984) and United States v. J.W.O., 940 F. 2d 1165 (8th Cir. 1991). So ordered this 14th day of November, 1996."

MR. PARKER: It's signed by Susan Webber Wright, United States Judge?

GRAND JURY FOREMAN: Signed by Susan Webster Wright, United States District Judge.

MR. PARKER: Thank you, Mr. Foreman. I'd like to mark this as an exhibit.

Q. [By Mr. Parker:] Okay. At this point, Mr. Hubbell, do you understand that order?

A. Yes, sir. I'd like to show it to my counsel.

Q. That's fine. We'll take about a 10—we'll take a 10 minute break while we're doing that, if that's okay with y'all.

(The witness was excused at 10:36 a.m. and was recalled at 10:45 a.m.)

GRAND JURY FOREMAN: Mr. Hubbell, you are reminded you are still under oath.

A. Okay.

Q. [By Mr. Parker:] You don't have even to—Mr. Hubbell, did you bring documents here with you today?

A. Yes.

Q. And where are they at?

[5] A. Right outside the door.

Q. Okay. We are going to take a break and go outside and look at those now. Okay. Thank you, Mr. Hubbell.

(The witness was excused at 10:45 a.m. and was recalled at 10:50 a.m.)

GRAND JURY FOREMAN: You are reminded, sir, you are still under oath.

A. All right, sir. Thank you.

Q. [By Mr. Parker:] Now, Mr. Hubbell, you received the Subpoena that was issued to you; is that correct?

A. Yes.

Q. And attached to it was a Subpoena Rider asking for particular documents; is that correct?

A.Yes.

Q. Now I only have one copy, so I am going to have to—we are going to have to go over this. I don't have one to hand you.

A. Okay.

(Grand Jury Exhibit No. 1244 marked for identification.)

Q. I am going to hand you what's a copy of Exhibit—well, I'll just hand you a copy of Exhibit 1244. Now, paragraph A of the Subpoena Rider, I am going to summarize this, but it says, "Any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received, provided to you, [6] your wife, or children from January 1st, 1993 to the present, including identity of employers, clients, legal or other type work." Did you provide all those documents pursuant this Subpoena?

A. Yes.

Q. Paragraph B, "Any and all documents reflecting, referring, relating to any direct or indirect sources of money or other things of value received by or provided to Webster Hubbell or his wife or children from January 1st, 1993 to the present, including but not limited to billing memoranda, draft statements, bills, final statements, or bills for work performed or time billed from January 1, 1993 to the present."

A. Yes.

Q. Have you provided all those documents?

A. Yes.

Q. C is a copy of all bank records for you, your wife, your children, for all accounts from January 1, 1993 to the present, and lists registers, canceled checks, etc. Did you provide all those documents?

A. Yes

Q. All right. Including your children's bank records?

A. Those that are in my possession.

Q. Okay. Those are all the records in your possession, custody, or control; is that correct?

[7] A. Yes.

Q. That would include—well, we'll talk about that outside.

A. Okay.

Q. Paragraph D, "Any and all documents reflecting, referring, or relating to time worked or billed by you from January 1, 1993 to the present." Have you provided all those records?

A. Yes.

Q. Including those that are in your—are there any that you had that are not in your possession, custody, or control? Did you give—has anybody else gotten any of your billing records, memoranda, anything like that?

A. Yes.

Q. Are they—are those records not here today or are copies in these boxes?

A. I think we need to step out.

Q. I do, too.

(The witness was excused at 10:54 a.m. and was recalled at 11:05 a.m.)

GRAND JURY FOREMAN: You are reminded again, sir, that you are still under oath.

A. Okay.

Q. [By Mr. Parker:] Mr. Hubbell, when I started—let's go back. Let's back up one second.

[8] A. Okay.

Q. And I said the Subpoena calls for you to produce any records that was in your possession or under your control. And you're a lawyer. You understand the concept of constructive possession, that if you give somebody else something—if I loan somebody my car but I have the right to ask for my car back, that's still within my possession.

A. Yes, sir.

Q. You understand this Subpoena would require you to produce those documents?

A. I understand.

Q. And your answers to paragraphs A, B, and C, your answers were yes, that you've produced all those records?

A. Right.

Q. With that in mind, is your answer still yes to those paragraphs?

A. Yes, it is.

Q. On paragraph D, reflecting, referring, and relating to time worked or billed by you from January 1st, 1993 to the present?

A. Yes.

Q. Have you produced all those records?

A. Yes. I have.

Q. Paragraph E, "Any and all documents reflecting, referring, or relating to expenses incurred or [9] disbursements of money by you during the course of any work performed or to be performed from January 1, '93 to the present. Have you provided all those documents?

A. That are in my custody and control, yes.

Q. Any and all documents—paragraph F, "Any and all documents reflecting, referring, or relating to sched-

ules of activities, this means calendars, telephone books, airline tickets—" there's a whole laundry list, "—from January 1st, 1993 to the present." Have you provided all the records requested in paragraph F?

A. Can I—I need to look at this just one second.

Q. Sure. Take your time.

A. The answer is yes, subject to the attorney/client privilege.

Q. All right. Paragraph G, "Any and all documents reflecting, referring, or relating to any retainer agreements or contracts for employment of you, your wife, or children from January 1, 1993 to the present." Have you provided all those documents here today?

A. Yes.

Q. Paragraph H asks for all your tax records for you, your wife, and your children for tax years 1993 to the present. Have you provided all those?

A. Yes.

Q. That are in your possession. Are your children's [10] tax records in here?

A. [No audible answer.]

Q. Okay. Paragraph I, "Any and all documents reflecting, referring, or relating to work performed or to be performed for or on behalf of the City of Los Angeles, the Los Angeles Department of Airports, or any other Los Angeles municipal or governmental agencies—or governmental entity, Mary Leslie or Alan S. Arkatov," and it gives a laundry list.

A. The answer is yes.

Q. All right. Paragraph J, "Any and all documents reflecting, referring, or relating to work performed or work to be performed by Webster Hubbell or his wife or children on the recommendation, counsel, or other influence of Mary Leslie or Alan Arkatov," and asks for a similar list to the paragraph above. Have you provided all of those documents?

A. Yes. Subject to the attorney/client privilege.

Q. Paragraph K, "Any and all documents related to work performed or to be performed for or on behalf Lippo Ltd., formerly Public Finance, H. K. Ltd., the Lippo Group, the Lippo Bank, Mochtar Riady, James Riady, Stephen Riady, John Leun Wai Lee, John Huang, Mark W. Grobmyer, C. Joseph Giroir, Jr., or any affiliate, subsidiary, or corporation owned or controlled by or related to the aforementioned [11] entities or individuals, including but not limited to," and it gives a list of documents.

A. The answer is yes.

Q. Okay. All right. Now, I've read over this and I've summarized portions. Did you read this document in its entirety before you came here today, the rider, what we're asking? Do you fully understand everything we're asking for here today?

A. Yes. I do.

Q. And have you made a complete search for all the records that was asked for in this Subpoena?

A. We got to step outside, see if I can answer that.

MR. BENNETT: Well, have you made a search or caused a complete search to be made? You still need to step outside?

A. I need to step outside.

MR. PARKER: Very well.

(The witness was excused at 11:09 a.m. and was recalled at 11:25 a.m.)

GRAND JURY FOREMAN: Sir, you are reminded you are still under oath.

Q. [By Mr. Parker:] Okay. Mr. Hubbell, the question was, in response to the Subpoena, have you searched or have you made a thorough search or caused a thorough search to be made in response to this Subpoena?

[12] A. Yes.

Q. Now, other than the two assertions of attorney/client privilege on paragraphs J and K—or I'm sorry, J and F, have you withheld any other documents required by this Subpoena because of any other privilege?

A. There is attorney work product privilege.

Q. Is that the two paragraphs that you referred to earlier?

A. Yes.

Q. Okay. Other than those two paragraphs, are there any other documents withheld?

A. No.

Q. Under any other privilege?

A. No.

MR. BENNETT: And just so we're clear on the record, I take it there is some quantity of documents that you have not produced based on the assertion of those privileges; is that correct?

A. That's my understanding. Yes.

MR. PARKER: All right. That's all we have, Mr. Hubbell.

A. Thank you.

(The witness was excused at 11:28 a.m.)

[Filed Jan. 6, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

Division No. 94-1

IN RE: MADISON GUARANTY SAVINGS &
LOAN ASSOCIATION

Before: SENTELLE, *Presiding Judge*, BUTZNER and FAY, *Senior Circuit Judges.*

ORDER

Upon consideration of the Application for Order of Referral to Independent Counsel, filed with the Court on December 31, 1997, it is hereby

ORDERED that the Application be granted. Pursuant to 28 U.S.C. § 594(e), the following matters are referred to the Office of Independent Counsel for investigation and, if warranted, prosecution:

(i) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to criminal tax violations and mail and wire fraud, regarding Mr. Hubbell's income since January 1, 1994, and his tax and other debts to the

United States, the State of Arkansas, the District of Columbia, the Rose Law Firm, and others; and

(ii) whether Webster L. Hubbell or any individual or entity violated any criminal law, including but not limited to obstruction of justice, perjury, false statements, and mail and wire fraud, related to payments that Mr. Hubbell has received from various individuals and entities since January 1, 1994.

The Independent Counsel shall have jurisdiction and authority to investigate and to prosecute the matters described above to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994. The Independent Counsel shall have jurisdiction to investigate allegations or evidence of violation of any federal criminal law, including related allegations or evidence, other than a Class B or C misdemeanor or infraction by any person or entity, as necessary to resolve the matter described above, and to prosecute such violations if warranted.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, arising out of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. The Independent Counsel shall continue to enjoy the full jurisdiction conferred upon him as a result of previous orders of this Court.

The Independent Counsel may disclose this document and its contents only to the extent necessary to advance the investigation and prosecution.

Per Curiam
For the Court:
MARK J. LANGER
Clerk

by /s/ Marilyn R. Sargent
MARILYN R. SARGENT
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR 98-151-01-04

UNITED STATES OF AMERICA,
Plaintiff,

v.

WEBSTER L. HUBBELL, SUZANNA W. HUBBELL,
MICHAEL C. SCHAUFELE, and CHARLES OWEN,
Defendants.

Washington, D.C.
Friday, June 26, 1998

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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* * * *

[3] PROCEEDINGS

(10:00 a.m.)

(All defendants present except Defendant Owen).

THE DEPUTY CLERK: Your Honor, this is Crimnal Action 98-151, United States of America versus Webster L. Hubbell, Suzanna W. Hubbell, Michael C. Schaufele, and Charles Owen. Representing the government, David Barger.

MR. BARGER: Good morning, Your Honor.

THE COURT: David Binhak.

MR. BINHAK: Good morning, Your Honor.

THE DEPUTY CLERK: Patrick O'Brien, and Darrell Joseph.

THE COURT: Good morning.

THE DEPUTY CLERK: Representing the defendants, John Nields.

THE COURT: Mr. Nields.

THE DEPUTY CLERK: Laura Shores.

MS. SHORES: Good morning, Your Honor.

THE DEPUTY CLERK: Christopher Todd, Wan Kim, and Drake Mann.

MR. MANN: Good morning, Your Honor.

THE COURT: Good morning everybody.

A number of motions are before me—this big crowd here, I think maybe it is the overflow crowd that couldn't get in up the hall.

[4] Maybe we could just resolve these motions today and take them right over there. One-stop shopping.

There are a number of quite serious motions presented in this case and although I don't want to indicate any relative degree of importance with any of them, I think the motion to dismiss count 2, which is the motion taking the position that count 2 may not be charged because the Justice Department manual says it may not, is a motion on which I don't think I need to hear a lot of argument. The papers are clear. I think I can decide that without argument.

Similarly, the motion to dismiss counts 6 through 10, the mail and wire fraud counts, if we have some time, I may hear some argument on that; but I am not greatly in need of argument on that.

I would like to spend the time we have this morning —and by the way, there is no fixed time here. I am good until half past 12:00, if we need to be; and maybe even into the afternoon if we are—if the time for argument is necessary.

But I want to spend most of the time this morning talking about the motion to dismiss the indictment as to Mr. Hubbell who asserts—who asserts use of immunity for the documents he turned over under subpoena, and the motion to dismiss the indictment as outside the jurisdiction of Judge Starr.

[5] The motion to compel disclosures of the application for referral. Again I think I don't have to hear a lot of argument on; and the motion to—the OIC's motion to disqualify or for a hearing on the potential conflict of interest of Mr. Nields' law firm with respect to the two Hubbells is an issue we will reach, if at all, at a later time.

I think I would like to begin with the use immunity motion. Who's going to argue that? Mr. Nields?

MR. NIELDS: Your Honor, I am, for Mr. Hubbell. Good morning.

THE COURT: Good morning, sir.

MR. NIELDS: May it please the Court:

At the outset, at the very outset of this investigation that led to these charges, the independent counsel served on my client a document subpoena calling for the production of whatever documents he might have in a very

broad range. They included virtually any document relating to his finances, his wife's and children's finances, and his tax matters.

It turned out that among those documents were documents showing fees that had been inadvertently left off of his 1994 tax return; and for that and other reasons, Mr. Hubbell asserted his valid Fifth Amendment privilege and declined to tell the independent counsel what documents he had [6] if any that were responsive to the subpoena.

The independent counsel accepted that claim of privilege, went to the Court and got court-ordered sovereign immunity under the statute, section 6002 and then conferred immunity; and under protection of immunity, Mr. Hubbell honestly and truthfully admitted the existence of every single document that was responsive to that subpoena and then turned those documents over.

Thereafter, the independent counsel used those documents—and now I'm going to quote from their brief filed in this case, they used those documents, "To develop evidence that led to this prosecution."

They claim no independent source for the evidence that led to this prosecution. What they do is they assert that having compelled Mr. Hubbell to produce documents under immunity, documents which he had a Fifth Amendment right to withhold and they got only because of the immunity order, they claimed the right to use those documents against him to put him in jail.

We believe they're wrong and that they can't do that.

Your Honor, we submit that the relevant body of law —the most relevant body of law—is the law of immunity, and it is an emphatic and clear body of law. It begins with the statute. If I may, Your Honor—is this on?

[7] If I may, Your Honor, the immunity statute is comprehensive in its language. I can do it from here. I can see it from here. You can see it from here. We're fine.

It provides, Your Honor, that if a person's Fifth Amendment privilege is overridden with an immunity order, the witness can no longer refuse to answer based on his privilege. But this is what he gets in return: He gets a promise that no testimony or other information compelled under the order or any information directly or indirectly derived from such testimony or other information, may be used against that witness in a criminal case.

And in the landmark case, Your Honor, of Kastigar, which is the Bible on immunity—and it is alive and well as is demonstrated by the D.C. Circuit Court of Appeals decision against U.S. against North—Kastigar makes it very clear how comprehensive the immunity is that you get from this statute.

Kastigar talks about, and I'm quoting, "total prohibition on use." It says you get sweeping proscription of any use direct or indirect of the compelled testimony and any information derived therefrom.

It says that the witness is assured that the compelled testimony can in no way lead to the infliction of criminal penalties.

It is very clear, Your Honor, that you get protection not only from the testimony that you are compelled to give—[8] here the act of production or the testimony implicit in the act of production—you get immunity from anything that is derived from that testimony.

And then to make it absolutely clear, so that no one could misunderstand the nature of the immunity, Kastigar said the following: It said that the immunity statute was

constitutional because and only because it leaves the witness and the federal government in substantially the same position as if the witness had claimed his privilege in the absence of a grant of immunity.

The independent counsel says that they can take the documents that they got only under immunity, that he had a Fifth Amendment right to withhold, they can take the documents that they only got because of the immunity order and use those documents to put my client in jail.

That violates the clear and explicit test that is up on that board. Because it is undisputed that under the Fifth Amendment, Mr. Hubbell had a right to withhold those documents. The independent counsel could not have gotten those documents over his Fifth Amendment claim. They got the documents because of immunity.

And that test says they cannot use what they get under immunity that they couldn't get under the Fifth Amendment. They could not use that to put him in jail.

Your Honor, we quoted this language twice in our [9] brief, two different places. We featured it. It was not mentioned in the independent counsel's response. Kastigar is not discussed anywhere in the independent counsel's response. They cite it. They contain no discussion of it whatsoever. I do not know what their answer is to that. I don't believe they have any.

Another thing they didn't respond to, Your Honor, is the Supreme Court's fairly recent decision in Braswell.

The independent counsel makes the statement in their brief, which I put up on that board, they make the statement as the Supreme Court has recognized on several occasions act-of-production immunity will only rarely preclude the United States from using the contents of compelled records to find and develop evidence.

They say that, but they don't cite any Supreme Court cases, because there aren't any. There is no Supreme Court case that says that. What the Supreme Court says instead, I put that at the bottom—Braswell, majority opinion, written by the Chief Justice:

"If the government has any thought of prosecuting the custodian"—that's the person who produces the documents —"a grant of act-of-production immunity can have serious consequences. Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively."

[10] And then they go on to say in the very next sentence, "The government would have the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate, independent sources."

The independent counsel says nothing in its brief about that language in Braswell, which we also quoted on two occasions in our papers.

Your Honor, another thing the independent counsel doesn't say anything about is the purpose underlying the Fifth Amendment privilege. Indeed, one would get the impression I would submit from reading their brief—their papers and understanding their position that the Fifth Amendment privilege doesn't seem to have any purpose because it can be so easily done away with.

We submit, Your Honor, that the Fifth Amendment privilege relieves a person in this country of the obligation to tell the truth to the government when the truth may cost that person his life or his liberty.

The government cannot compel a person to tell the truth when the truth may cost that person his life or liberty.

Where the government serves process on a person in this country and as a practical matter that person has two options—as a practical matter—one is to tell the truth and risk going to jail or the electric chair and the other is to falsify and go free, when those are the options, faced by a [11] person who gets process from the government, the Fifth Amendment applies.

It does not permit falsification; but it relieves the person of the obligation to tell the truth. That's the cruel trilemma [sic]. That's all the cases that we cite. That, Your Honor, is the core of the Fifth Amendment privilege. It is the rock bottom, irreducible minimum, what the Fifth Amendment does. It is the Fifth Amendment without frills, Your Honor. It is the Fifth Amendment without anything that was added on to it by the so-called "liberal court" in the 1960s and '70s.

That is the basic Fifth Amendment privilege as it has existed since the time the Fifth Amendment was adopted as part of our Bill of Rights.

Now what the independent counsel says is that they can compel a person to tell the truth and have it cost them their life or liberty anyway. For example, they say that the prosecutor in Los Angeles could have given a subpoena to O.J. Simpson directing him to produce his Bruno Magli shoes. They admit that O.J. Simpson would have a Fifth Amendment right not to tell the government whether he had any Bruno Magli shoes and, therefore, not to comply with the subpoena. They concede the Fifth Amendment applies; but they say they could give an immunity, force him to tell the truth about whether he had those shoes and turn them over, and then they could use the shoes to put him in the electric chair.

[12] That's their position.

And they say that they can force Webb Hubbell to tell the truth about what documents he has, every single one. He has to tell them the truth about every single document when he might love to pretend he didn't have them. They can make him tell the truth, turn those documents over, and have that fact cost him his liberty.

THE COURT: Is the Bruno Magli shoes example quite precise enough? I mean, aren't they really telling—isn't this a subpoena to turn over the contents of your closet?

MR. NIELDS: Well, Your Honor, what we would say that the result is the same and the issue is not changed even if they give him a subpoena: Turn over all your shoes; and upon honest compliance with that, among the shoes he turns over are shoes that will put him in the electric chair.

The Fifth Amendment privilege is very clear, and the cases are very clear. The actual response to the question does not have to be itself incriminating for the Fifth Amendment privilege to apply. If the response to the question, truthful response will lead to incrimination, it applies; if it provide a link in a chain of evidence or would lead to evidence, it applies.

The issue is are you forcing the person to give a truthful response and using the fact that the person is truthful and honest in his response to put him in jail? If so [13] the Fifth Amendment applies and you can't do it.

And anybody who has ever had to respond to a document subpoena understands that truthfulness and honesty is absolutely critical and required.

In the normal civil litigation context, where the client is a corporation, the Fifth Amendment doesn't apply. It is a civil case, somebody has got to go over every single

document; and if they find one that is damaging to their case, they have to take that document, hold it up against the subpoena, and they have to honestly say is that called for; if it is, they have to turn it over.

But in the individual case, where it is a criminal investigation and being truthful and honest in response will result in your going to jail, the Fifth Amendment says you don't have to answer. That's why the Fifth Amendment applies to document subpoenas, which it does. That's conceded. That's the law of the land. It does apply. That's why.

That's common ground. And remember, again, the independent counsel has never taken the position that Hubbell had no Fifth Amendment privilege. They've conceded he had the privilege. He asserted it. He was entitled under his privilege to withhold the documents and not tell them what he had. They compelled it under immunity; and if they compel it under immunity, then they have to hold him harmless. That's the rule. That's the deal.

[14] Your Honor, there's one point really only one other point I want to mention. If the independent counsel's position here were true, were correct, and if it became the law of the land, then every prosecutor in the United States of America could begin his investigation by going to the target, serving a comprehensive document subpoena, forcing the target to produce all of that information, under immunity, and then poring through it to see if they could find some crime.

Wigmore, in a passage that we quote in our original brief, says that one of the purposes—and I would concede this is not the core purpose, which I have already discussed—but one of the purposes of the Fifth Amendment is to prevent precisely that kind of thing from happening.

Because there is something very wrong about a prosecutor beginning with the person and seeing if he can find a crime rather than beginning with the crime and seeing if he can find out who did it.

Your Honor, in my second year—

THE COURT: I'm back at Bruno Magli shoes.

MR. NIELDS: All right.

THE COURT: The Bruno Magli shoes hypothetical is also different from this case in that in that case, the prosecutor knew what the crime was he was investigating and knew what he was looking for; unlike this case where, as I understand it, the theory of the subpoena in the first place was is there evidence of obstruction of justice. And the [15] answer was maybe not obstruction of justice, but here's a tax problem, quite different from the Bruno Magli shoes. I'm not quite sure that's a question so much as thinking out loud, Mr. Nields. Proceed.

MR. NIELDS: My reaction to it, Your Honor, is twofold. First of all, once again, the Fifth Amendment clearly applies regardless of whether the risk of incrimination is in the mind of the questioner when they ask the question. Mr. Hubbell clearly had a right under the Fifth Amendment not to turn over documents that he thought they might use to try to prove some other crime against him. Clearly has that right.

I would submit, developing a point I was just making before, that there are extra special reasons to hold what the independent counsel was doing here inappropriate where, without probable cause to believe that there was any particular crime, they begin with the subject and force the subject to produce a wide range of documents which they then use to see if any one of a number of potential crimes may have been committed.

As I said, I was taught in second year law school that one of the most important principles of prosecutorial power was that you don't begin with the person; you begin with the crime and work back to the person. And if—if what was done here became the law of the land, every prosecutor in the country would have an easy path if they have a person they're interested in investigating to go to that person, compel them [16] to produce a wide range of documents under immunity, and then see if they could find some sort of crime.

And, indeed, I was taught that both the Fourth Amendment's requirement of probable cause before you can search an individual and the Fifth Amendment's prohibition against going to the individual as the primary source of information were in some way designed as tools that would steer prosecutors in the direction of investigating crimes and leading to people rather than the other way around.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Nields. Mr. Binhak?

MR. BINHAK: Yes, Your Honor. Good morning. I am Stephen Binhak. I represent the United States.

THE COURT: Good morning.

MR. BINHAK: Judge, I'd like to start with Braswell. That's an excellent place to start. And I want to start where Chief Justice Rehnquist started in Braswell, the first paragraph of his decision after he discussed what the facts of the case are and what did he say?

Chief Justice Rehnquist: "There is no question but that the contents of subpoenaed business records are not privileged."

No question.

And what's before Braswell? What leads up to Braswell? Doe; before Doe, Fisher. If Boyd were still the [17] law, then Mr. Hubbell might have an argument; but Boyd was decided in 1889, I believe. Since that time, the Supreme Court has announced that the contents of business record are not privileged.

Now, Mr. Nields, on behalf of his client, tells you that 6002 says otherwise, that the statute reaches into the contents. That is wrong. That is an argument that was made in front of the Seventh Circuit and was rejected. Let me read to you from the United States versus Porter, footnote 4.

"Such a reading, however, ignores the plain intent of the statute that the grant of immunity thereunder is intended to be as broad but not broader than the privilege against self-incrimination. Since Fisher held that the contents of these documents do not come under that privilege, the statute plainly does not extend to them. In addition, we note that Congress indicated that the statute's scope is intended to be comprehensive, including all information as given testimony or orally."

What is the Court saying there? They are saying what Kastigar says, and we emphatically agree. Kastigar says one thing: You got to put the guy who raises the Fifth Amendment defense, which is defeated by a compulsion order, in substantially the same position, but only substantially the same position; and the Seventh Circuit has said that the act-of-production immunity is a limited—limited—[18] immunity; and the reason they say limited is because you must—must—you must respect the distinction that Fisher and Doe and this District Court of the—excuse me, of the Court of Appeals for the District of Columbia—

THE COURT: Had a nice sound to it.

MR. BINHAK: Excuse me. This District Court, too—not you but other members of this District Court—have recognized over and over again that the contents is not privileged. That the acts of—the testimonial acts of production are.

THE COURT: Okay. We are all on the same page about contents.

MR. BINHAK: So the point is, Judge, how do we erase or negate the testimonial acts of production? How do we do that?

How do we put him in substantially the same position?

THE COURT: Okay.

MR. BINHAK: The answer is that we don't show and we don't tell any fact finder in this case about the fact that Mr. Hubbell produced documents pursuant to this subpoena.

THE COURT: Well, that's—do you construe the same position language to mean only the same position at trial?

MR. BINHAK: Sir, I believe that that—that will—will fully—will fully vindicate his Fifth Amendment rights [19] for the reasons I've outlined in my brief.

But don't take my word for it, Judge. That's what Judge Bryson wrote in his grand jury practice manual; and it—and he says that's what you do. That's what the Court in Northern District of Illinois did in Trader Roe. That's exactly what they did. That's exactly the remedy that they—that they fashioned and that's what works. And the reason is for—is because that action

negates the testimonial acts of production, and that's what we've immunized. We have not immunized the contents of the document.

THE COURT: Well, I don't have the advantage of knowing what the facts are of the cases that you're talking about the Northern District of Illinois case. But were any of those cases in which the prosecutor first asked for all of your documents, then decided whether you'd committed a crime, and then prosecuted you?

MR. BINHAK: Sir, in just about every case that we're referring to here—many of them are tax cases—and just about every case we're referring to was a subpoena for business records. That's how Doe two started with the sole proprietor for several of his businesses in Philadelphia where were—the government believed were implicated in organized crime kickbacks.

That's what the story was in Fisher when the IRS went to the lawyer for the accountant and asked for all the—[20] excuse me, the lawyer for the taxpayer and went for all his documents. That's what happened in Fox in the Second Circuit when the—and that's what happened in Trader Roe.

THE COURT: Mr. Binhak, let me ask you this: Let's get directly to the same position issue and let's forget the well, let's not forget it.

Let's construe the term "same position" meaning the same position throughout the process from beginning to end, not just before a jury.

MR. BINHAK: All right. I agree with you.

THE COURT: You do agree—

THE COURT: —that the language—

MR. BINHAK: Yes, sir.

THE COURT: —ought to be construed that broadly?

MR. BINHAK: Yes, sir. And I agree that our—

THE COURT: How does the government get these 13,000 pages of documents if it doesn't get them under compelled subpoena?

MR. BINHAK: Well, we could do it any number of ways, Judge.

THE COURT: How about a search warrant?

MR. BINHAK: A search warrant is fundamentally different than a subpoena.

THE COURT: Could you have gotten these documents [21] with a search warrant?

MR. BINHAK: At that time?

THE COURT: Yes.

MR. BINHAK: No.

THE COURT: Because?

MR. BINHAK: Because at that time—

THE COURT: —you didn't have probable cause, you couldn't convince a magistrate that you had probable cause to believe that the crime of nonpayment of taxes was involved?

MR. BINHAK: That is correct.

THE COURT: Okay.

MR. BINHAK: But that's a Fourth Amendment analysis sir, and a Fifth Amendment analysis is very different.

THE COURT: Well, I'm just trying to figure out how we're going to get him in the same position. You couldn't have got there with at search warrant?

MR. BINHAK: Yes, sir.

THE COURT: All right. How else would you get there?

MR. BINHAK: We would get there—we could do it one of two ways. First we could do it with a subpoena, which is what we did, and what we're allowed to do.

THE COURT: Well, that kind of begs the question.

MR. BINHAK: But we are allowed to do that. Then the cases are very clear that when he raises his Fifth Amendment [22] right, that we are allowed to compel his testimony.

Let me go back one step and say what the third way is.

The third way is we certainly could have gotten a Dun & Bradstreet on him. We could have found out what his bank records were. We could have gone and subpoenaed all the individual banks for these records. We could have gone to the papers that he filed with the IRS. We could have gone to the accountant. We could have gone to his credit card companies. We could have gone to his banks. We could have gotten every single one of those things.

THE COURT: And why didn't you do that?

MR. BINHAK: We do not have to do it in that order, Judge.

THE COURT: Because it is easier to do it the other way?

MR. BINHAK: It may be easier, but it puts him in no different position because—

THE COURT: Well, Mr. Binhak, isn't it actually correct that the reason you didn't do that is because you weren't looking for that information when you sought these documents, and you weren't looking for a tax violation at the time you sought these documents? You were looking for something quite different?

MR. BINHAK: Well—

[23] THE COURT: In fact, you were looking for evidence of obstruction of justice by other people, were you not?

MR. BINHAK: I don't—I agree with the first part of that but not wholly. I think it is accurate to say we were looking for obstruction of justice, Judge.

But on the other hand when we looked at mail fraud the first time with Mr. Hubbell, we found that there was tax evasion. And the obstruction of justice in this case was a very specific obstruction of justice, which was alleged at that time and was investigated by the Congress. And that was that Mr. Hubbell, it was alleged, was receiving payments as hush money in order to not cooperate with the Whitewater investigation.

Now, oftentimes when people receive illegal income, they do not report it on their taxes. That's why—and I know you know this, because I know you sit in a busy court. Tax counsel often are part of mail fraud and wire fraud prosecutions by the government. They are often a part of drug prosecutions by the United States. And they are often a part of just about virtually any criminal act which includes the accumulation of wealth. And why is that?

It's because people don't want to report their income to the United States so that the United States may be tipped off that they are engaging in illegal activity. So I

agree with you, Judge, that we were looking at obstruction of [24] justice; but to say that, thereby, we were necessarily not looking at anything else, I think is inaccurate.

Now, in addition, Judge, the only way we would have found out about tax violation is by reading the contents of the documents. That's how we found that.

And Bouknight, which is Justice O'Connor's case, where Justice O'Connor writes, says specifically—and this is the case where the child is compelled to be produced and the—the person who receives the subpoena says well if you get the child you'll be able to do any kind of test on them to be able to prove he's my child, you'll be able to prove that he's been abused, any one of these things. And Justice O'Connor says flatly out just because you subpoena the thing, there may be a Fifth Amendment issue there, with the act of production; but the contents will not be reached.

So the question then again comes back to this answer: How do we negate the testimonial acts of production? And there are three under Fisher. Number one, authentication. These documents are authentic. Number two, these documents exist. And number three, I'm the person who produced them.

When you look at the subpoena that Webster Hubbell received, you see he handed over documents; and we get them, as I described in my brief, on the street, in a box, with nothing but the subpoena to describe them. And what do we have? We have Webster Hubbell's business records.

[25] Now, if we read the documents and we find anything more, we're allowed to do that. This is from the beginning. I'm talking about the investigation now. We

can do that. Bouknight says we can do that. Fisher says we can do this. Both Doe's say we can do that. And all the cases in the D.C. Circuit say the same thing. They recognize that distinction. How do we put Webster Hubbell back into the same position? Because of the testimonial acts of production.

Well, we don't tell any fact finder at any time that he's the source of the records. If we do that, then we wipe out his authentication. No one will ever know that he was the source of these documents. And all the cases that deal with authentication say—including Fisher—say that if the government can put the document into evidence with someone else, they will never know that Webster Hubbell brought it, gave it to the government. If the government can prove the document—the—authenticate the document in any other way, then that negates the taint.

The same is true for the source and the existence, that if you don't tell anybody and you just treat it like a record, here's this record that I found on the ground, it is just a record, he's in the same position.

Now, if we read the record and find something out, if we find out that he's not reported income as we did here, if we find out that he's opened up bank accounts that were [26] specifically created with the intent to impair and impede the ability of the United States from getting the taxes that he admitted that he owed, if we do that through the contents of the document, there is no Fifth Amendment implication.

It does not touch that which we—what we immunize. Remember, under the Seventh Circuit limited act-of-production immunity is a limited immunity. And the Seventh Circuit says it does not create a free pass. It does

not create a total bar. What it does is it—look at the Fifth Amendment as an entire puzzle.

Act-of-production immunity takes out specific pieces and only for the act of production. We put those pieces back by not saying to a jury or to a judge in any evidentiary hearing that these records come from him. Now he's in the same position, Judge; and anything else that we get comes from the contents.

Now that satisfies Kastigar because he's in substantially the same position. He said I'm going to raise my Fifth Amendment right as to this little piece, these three testimonial aspects of production that are outlined in Fisher; and we give him that. That puzzle, that piece of the puzzle, we take out; and we protect that one hundred percent. That entire piece of the puzzle is protected.

But that doesn't change the rest of the puzzle. He has no Fifth Amendment right there. What they want you to do, [27] what they want you to do is say all right, well, you took out this piece of the puzzle but you have to give us protection on the whole puzzle. Well, that's wrong.

And Fisher and Doe and the D.C. Circuit and the Seventh Circuit say otherwise.

THE COURT: Which circuit and the Seventh?

MR. BINHAK: The Seventh Circuit. Specifically the —that's the Trader Roe and the Porter case—specifically say otherwise. The Seventh Circuit emphatically rejects, explictly rejects the argument that Mr. Nields came in and gave you first.

As far as a link in the chain, Judge, whether it will be a link in the chain, all that Webster Hubbell is left with, once we give him—once we negate the testimonial

acts of production, the only thing that he's left with is that he has produced business records from a particular period. That's it. We don't know that they're Webster Hubbell's business records. We don't know that—we don't know that he produced them. We have to treat them as business records, that we just tripped over on the street.

Now there's only—first of all, there's nothing incriminating about that. There's nothing incriminating about the fact that a person has business records.

If you want to import the Fisher analysis forward—which is the wrong thing to do, because that would be [28] appropriate if we said you have no Fifth Amendment right. We will not even give you Kastigar—the Doe immunity, and we went into a court down in Arkansas, where the subpoena was—where this was—where this subpoena was issued— if we went down there, they would have said we have a Fifth Amendment right. If we had said at that time you have no Fifth Amendment right, then all these cases that the defendant cites would become relevant; and what would—what would we be arguing? We would be arguing whether it was a foregone conclusion.

Well, what the United States submits to you is that when you negate the testimonial acts of production, the only thing you are left with is the fact that Webster Hubbell has business records. If you want to import—if you want to import the rest of that analysis left, there is nothing incriminating at all about saying I have business records. Period.

That's the only knowledge we get out of the production. Anything else we get, we get from reading the documents. So what do we have? Let's say we have a tax return? A tax return that shows that Webster Hubbell has not reported income for a year. Let's say 1996.

We don't know that it came from him. We have to find another way to prove that. We would have to go to the IRS. We would have to go to his accountant. We would have to go to his lawyer. And all of these people could raise privileges, they [29] could raise statutory objections. But if we can't get another way to put that in, we've got nothing except for one thing: The fact that Webster Hubbell has business records.

THE COURT: Okay. Mr. Binhak, let me make very sure I understand what you're saying here.

You're basically conceeding Mr. Nields' point. You probably wouldn't concede it with quite the rhetorical flourishes he gave it, but you are basically conceding Mr. Nields' point that you are asserting a government—a power on the part of the independent counsel to issue a subpoena to any citizen saying give me all of your records. And I'm going to go through them and read them; and if I find something in them that is going to give rise to a criminal prosecution, I'm going to prosecute you.

Now, I'm not going to tell anybody where I got these documents, and the jury will never know where I got them, and the jury won't know that they're yours; but now that I know what's in them, I know the information that I can use to prosecute you.

Are you basically conceding that argument of Mr. Nields'?

MR. BINHAK: Yes. And let me explain.

THE COURT: That's really scary.

MR. BINHAK: It is not scary, sir. Let me explain to you why it's not. Because the Supreme Court has said in Fisher [30] that's okay. And that's how—

THE COURT: Well, let me—what do you make of the language in Fisher that the existence prong is implicated, if compliance with a subpoena adds to the sum of the government's—to the jury's—the government's—total information? What do you make of that?

MR. BINHAK: I say that if you are going to fully vindicate Fisher's ruling, that the contents are not privileged, then what you have to come—the conclusion you have to come to is that that is negated by the fact that the protection that we're giving—and that is what—that is what the Seventh Circuit said when it spoke to this issue. That is what the Northern District of Illinois court said in Trader Roe. That's what the D.C. Circuit cases stand for.

THE COURT: What D.C. Circuit cases stand for that?

MR. BINHAK: Judge, I believe that's what then Justice Scalia meant when he talked about the distinction, when he raised the Kastigar issue with the specific subpoena that was issued in In Re Sealed Case. I'm right with Mr. Nields and you. If we had offered that kind of subpoena, if we had asked, if we had asked Webster Hubbell for all documents that are indicative of tax fraud, then when you wiped out the testimonial—

THE COURT: That's not my point. My point is give me all of your tax records. Give me all of your business [31] records.

MR. BINHAK: Judge—

THE COURT: Then we will find out if you committed tax fraud.

MR. BINHAK: That's exactly what happened in Fisher, Judge. In fact, in that case the District Court

ruled that there was absolutely no Fifth Amendment privilege. That's exactly what happened—and the United States Supreme Court said that's okay.

In fact, Judge, just recently in the District of Maryland here in Greenbelt there was a civil rights case that ended in a plea—so there is no reported decision—where the United States gave Doe immunity for a police officer, and the facts are this: The police officer is involved in a civil rights violation; and as part of that violation, he shot off his gun, and the gun pierced the door of the front door of a car of an individual.

The United States goes to the police department and they find out the serial numbers of the guns that the police officer was carrying that night.

Then they gave the police officer a production—a subpoena that said we want all the guns you were carrying on that night. The night of the event. The police officer hands over the gun, and the United States does forensic analysis of the gun, and it links the bullet back to the car. [32] That's the kind of Doe immunity that's used in courtrooms all across the United States, and it is allowed because Bouknight says it's allowed. Bouknight says that if—you can use the contents of articles; Doe and Fisher say you can use the contents; and the fact is, Judge, the United States can open grand jury investigations to find crimes. And this was not just pulling Webster Hubbell out of the air, although that is not an issue that you need to reach here; and the IRS starts tax investigations that way.

The IRS starts tax investigations, and the United States starts white collar crime investigations because they have a suspicion about someone; and the grand jury is entitled to decide whether those—whether those suspicions are true or not.

And the grand jury can issue subpoenas to make those determinations; and the grand jury has a dual purpose. The grand jury is to find out whether someone—whether there is a criminal violation, but also whether there is not a criminal violation; and so this is the province of the grand jury, to issue these kinds of subpoenas.

THE COURT: All right, Mr. Binhak, I have a couple more questions for you.

I think the first is what is your answer to Mr. Nields' question: Where has the Supreme Court recognized on several occasions that act-of-production immunity will only [33] rarely preclude the United States from using the contents of compelled records to find and develop evidence?

MR. BINHAK: The answer is that the Supreme Court has not said that language precisely, but that is the conclusion.

THE COURT: Well, then where have they recognized it?

MR. BINHAK: They have recognized the distinction between the contents, which are never privileged, and the production, act of production, which is not; and what follows from that, it comes from the Braswell case on page 118. The government may offer testimony, for example, from the process server who delivered the subpoena and from the individual who received the records establishing that the corporation produced the records subpoenaed.

The Court is saying that the government can put those records in from Braswell as long as they don't use—as long as they don't tell the jury that they got them from Braswell. Therefore, the government, as the government concedes—as it must—it may make no evidentiary use

of the individual act, the act of productions; and the Court puts those in quotations.

"For example, in the criminal prosecution against the custodian," and I'm reading from page 118 here, "the government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation's [34] documents were delivered by one particular individual, the custodian."

That's where we're at, Judge. We're giving him what the Court tells us to give him in Braswell. We are completely wiping out the effects of forcing him to give us that portion—

THE COURT: I think we're getting repetitive here.

I take it then, Mr. Binhak, that you are not asserting and will not assert that the office of independent counsel at the time this subpoena was issued had any knowledge of the Bridgeport Group; right?

MR. BINHAK: I don't believe that was in the subpoena.

THE COURT: Or the account at the Pulaski County Bank?

MR. BINHAK: That was not in the subpoena.

THE COURT: Or the pension account check swap issue?

MR. BINHAK: But we did know Webster Hubbell had bank accounts.

THE COURT: And—you knew he had bank accounts and kept business records?

MR. BINHAK: Yes, sir. And if you read Trader Roe —and if you haven't, I know you will—you will see

Trader Roe specifically addresses this argument. It says that you don't have to know about the existence of every single [35] document and that comes from Fisher, because Fisher talks about classes and classifications of documents; and the Fisher—

THE COURT: So as far as you are concerned, the genus business records is big enough to permit the species check swaps and et cetera?

MR. BINHAK: Yes, sir. Fisher tells you that at page 419 and Butcher v. Bailey in the Sixth Circuit tells you the same. Because it tells you to look at classes of documents; and the only way you find out whether there was a check swap, the only way you find out whether there was a Pulaski Bank account, the only way you find out about any of this is by reading the contents of the documents.

And the Supreme Court has said it over and over and over again. No one compelled him to put those contents there.

THE COURT: Thank you, Mr. Binhak.

Brief reply, Mr. Nields?

MR. NIELDS: First, Mr. Binhak says that the D.C. Circuit Court of Appeals held in his favor in In Re Sealed Case; in other words, accepted the notion that the government can serve a document subpoena, compel production of documents under immunity, and then use the contents of the documents against the witness because the contents aren't privileged.

Actually what Judge—now Justice—Scalia said in that case is exactly the opposite; and I put that up on the board, Your Honor. The government made the same argument there [36] that they are making here, and he said

the fact that the contents of the tapes are unprivileged does not mean that they will necessarily remain untainted.

That's what the D.C. Circuit actually said.

Now I would like to respond just very briefly to the notion that all that one gets under immunity is a promise that the actual testimony given will not be used against you. In this case, the actual act of production will not be used against Mr. Hubbell. The jury won't be told about it.

There was a time, Your Honor, when Congress passed an immunity statute that only gave that protection. You only got protection from having your actual testimony used against you. Here, the act of production. Congress passed that statute. The Supreme Court struck it down because it was unconstitutional. That's Councilmen against Hitchcock and it is discussed at length in Kastigar.

What the government is saying here is that they want to give only the kind of immunity that the Supreme Court held unconstitutional in Councilmen against Hitchcock.

Third, they claim that the Bouknight or Bouknight case pulls in their favor. It doesn't at all. It doesn't involve immunity at all. It is a holding that the Fifth Amendment privilege simply did not apply to an order to produce a child. That's all it holds.

They quoted a moment ago from Braswell; but what they [37] didn't tell the Court is they were quoting from a part of Braswell that dealt with corporate documents. Fifth Amendment privilege does not apply even to the act of producing corporate documents. It was a very misleading quote that they gave.

Finally, Your Honor, I don't know exactly what was in their mind when they served the subpoena. I must say at the time I entertained the notion, I think the Court did,

that what they were really planning to do was get the evidence that they might use to see if someone else committed a crime; and then when that didn't work out, they then later turned around and decided to use them against Mr. Hubbell which violates immunity, it violates the Constitution, and this indictment should be dismissed.

Thank you.

THE COURT: Thank you, Mr. Nields.

All right. Before we take up the jurisdictional—jurisdiction of the independent counsel, a housekeeping matter.

I think I have two motions for leave to file under seal but one of them has been withdrawn. Am I correct about that?

MR. JOSEPH: Your Honor, one of the motions was withdrawn in part, that's correct.

THE COURT: In part?

MR. JOSEPH: In part. Yes.

* * * *

[Filed Jun. 30, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. Nos. 98-0394 (JR)
98-0151 (JR)

UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL,
Defendant.

PLEA AGREEMENT

The United States, by and through the Office of the Independent Counsel, and Defendant Webster L. Hubbell, by and through the undersigned counsel, pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, have entered into this plea agreement ("Agreement"). If the Court refuses to accept this Agreement and the Defendant's guilty pleas as set forth below, this Agreement and his guilty pleas shall become null and void and neither party will be bound thereby. The terms and conditions of this Agreement are as follows:

1. Defendant Webster L. Hubbell agrees to plead guilty to Count 1 in *United States v. Webster L. Hubbell,* Cr. No. 98-0394, D.D.C.; and agrees to plead guilty to a one count Superseding Criminal Information in *United States v. Webster L. Hubbell,* Cr. No. 98-0151, D.D.C., filed with this Agreement, subject to the conditons set forth in paragraph 5 below.

2. Count 1 in Cr. No. 98-0394, a felony, charges Defendant Hubbell with concealing by scheme material facts from the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC), in violation of 18 U.S.C. § 1001. Defendant agrees to withdraw his previous plea of not guilty and to enter a plea of guilty with respect to Count 1 only of Indictment Cr. No. 98-0394. The parties understand that the Defendant will admit that during the pendency of the *Frost* case, he knowingly failed to disclose to the FDIC and RTC by scheme a material fact which Defendant had a duty to disclose, namely, that during the pendency of the *Frost* case, the Rose Law Firm represented Precision Industries, a company whose president, and part owner, Jimmie D. Alford, was a defendant in the *Frost* case, as alleged in Paragraph 69(1) of Indictment Cr. No. 98-0394. The parties further understand that, had this case proceeded to trial, the Government was prepared to introduce evidence on Count 1 beyond that described in Paragraph 69(1) of the Indictment. The maximum penalty for this offense is a term of five years of imprisonment, a fine of $250,000, or an alternative fine based on gain or loss, any restitution ordered by the Court, a mandatory special assessment, and a three year period of supervised release.

3. The Superseding Criminal Information charges Defendant Hubbell with a misdemeanor for willful failure to pay a tax, in violation of 26 U.S.C. § 7203. Subject to the conditions in paragraph 5 below, Defendant agrees to enter a plea of guilty on Count 1 of the Superseding Criminal Information on the ground that he willfully failed to pay a portion of the tax due and owing. The maximum penalty for this offense is one year of imprisonment, a fine of $100,000, or an alternative fine based on gain or loss, any restitution ordered by the Court, a mandatory

special assessment, the costs of prosecution, and a one year period of supervised release.

4. The Court may, pursuant to § 5E1.2 of the *Sentencing Guidelines and Policy Statements,* order the Defendant to pay a fine sufficient to reimburse the government for the costs of probation, if any is ordered.

5. In exchange for Defendant Hubbell's pleas of guilty to Count 1 of Indictment Cr. No. 98-0394 and Count 1 of the Superseding Criminal Information Cr. No. 98-0151, the United States agrees that it:

(a) will dismiss with prejudice the remaining counts of Indictment Cr. No. 98-0394 at the time of sentencing;

(b) will dismiss with prejudice, at the time of Defendant Hubbell's sentencing, the Inudictment in Cr. No. 98-0151, D.D.C., as to Defendants Suzanna W. Hubbell, Michael C. Schaufele and Charles Owen;

(c) will not further criminally prosecute or investigate the Defendant, nor refer the Defendant to the Department of Justice for prosecution or investigation of any offenses arising out of the Independent Counsel's investigations; and

(d) intends to petition the Supreme Court for a writ of certiorari in *United States v. Webster L. Hubbell,* et al., No. 99-3044, concerning the Court of Appeals' decision with regard to act of production immunity. If certiorari is not sought or is denied, the United States agrees to move to vacate Defendant Hubbell's judgment of conviction on the Superseding Criminal Information and agrees to dismiss with prejudice the Indictment and Superseding Criminal Information in Cr. No. 98-0151 against Defendant Hubbell. If certiorari is granted and the Supreme Court resolves the case in a manner such that it fails

materially to improve the United States' position to the point that it is reasonably likely that Defendant Hubbell's act to production immunity does not pose a significant bar to his prosecution, the United States will move to vacate Defendant Hubbell's judgment of conviction on the Superseding Criminal Information and will move to dismiss with prejudice the Indictment and the Superseding Criminal Information in Cr. No. 98-0151 against Defendant Hubbell.

If certiorari is granted and the Supreme Court resolves the case in a manner that materially improves the United States' position to the point that it is reasonably likely that Defendant Hubbell's act of production immunity does not pose a significant bar to his prosecution, then the United States will not move to vacate Defendant Hubbell's judgment of conviction under the Superseding Criminal Information. The United States will, however, then move to dismiss with prejudice the Indictment in Cr. No. 98-0151 against Defendant Hubbell.

6. Pursuant to Fed. R. Crim. P. 11(e)(1)(C), the United States and the Defendant agree that the Defendant's sentence will not include incarceration.

7. The parties further recommend that the Court make the finding required by Sentencing Guidelines § 6B1.2(a) that the Court is satisfied either that the agreed sentence is within the applicable Guideline range or departs from the applicable range for justifiable reasons. Pursuant to Sentencing Guidelines § 6B1.2(c) and Fed. R. Crim. P. 11(e)(1)(C), this Agreement includes specific sentences calculated as follows:

I. Count 1, Indictment Cr. No. 98-394:

A. Offense Level

1. Base offense level 6, pursuant to Guidelines § 2F1.1(a);

2. No upward adjustment for loss, pursuant to Guidelines § 2F1.1(b)(1);

3. To the extent that a 2 level upward adjustment for more than minimal planning is warranted pursuant to Guidelines § 2F1.1(b)(2)(A), it is offset by the downward departure based on factors not adequately taken into account by the Sentencing Guidelines as set forth in subparagraph 7 below;

4. No adjustment because the offense did not substantially jeopardize the safety and soundness of a financial institution, pursuant to Guidelines § 2F1.1(b)(7)(A);

5. No adjustment for obstruction of justice or abuse of position of trust because such factors did not significantly facilitate the commission or concealment of the instant offense, pursuant to Guidelines §§ 3C1.1 and 3B1.3, respectively;

6. A 2 level downward adjustment for acceptance of responsibiliay upon execution of this Agreement and entry of the guilty plea pursuant to Guidelines § 3E1.1(a); and

7. An additional 2 level downward departure, pursuant to Guidelines § 5K2.0, based on factors not adequately taken into account by the Sentencing Guidelines, namely, Defendant's agreement to plead guilty more than a month

before trial; the resolution of two complex cases in lieu of trial, thereby permitting the government and the Court to allocate their resources to other matters; and the strong governmental and public interest in concluding matters as expeditiously as possible.

The parties agree that no further downward or upward departure from that set forth above is warranted. The adjusted offense level is therefore no higher than 4.

B. Criminal History Category and Sentencing Range

Based upon the calculations set forth above and the Defendant's Criminal History Category, the sentencing range is 0-6 months. Pursuant to Fed. R. Crim. P. 11(e)(1)(C), the specific sentence agreed to by the parties is a term of 1 year of probation, with no special conditions of confinement, to commence upon sentencing, no restitution, no fine, and a special assessment of $100. The parties agree that no restitution is appropriate because there was no loss to the Government as a result of the offense. The parties also agree that no fine is appropriate on this Count for the reasons set forth in paragraph 8 below.

II. Count 1, Superseding Criminal Information, Cr. No. 98-0151.

A. Offense Level

1. The parties agree that within the period covered by the Superseding Criminal Information, the Defendant had a duly assessed tax liability due and owing to the Internal Revenue Service in excess of $500,000;

2. The parties also agree that after the time of Defendant's sentencing (June 1995) in *United*

States v. Webster L. Hubbell, No. LR-CR-94-241 (E.D. Ark.) ("*Hubbell I*") his debts, including his tax liabilities from *Hubbell I*, substantially exceeded his assets, and that subsequent to Defendant Hubbell's sentencing in *Hubbell I*, the Defendant was unable to pay the full amount due and owing. Accordingly, the amount the Defendant willfully failed to pay is a figure lower than the assessed amount due;

3. The parties agree that the amount the Defendant willfully failed to pay is difficult to ascertain with certainty and is to some degree subjective. In addition, it is unclear to what extent the Court in *Hubbell I* included some portion of that underlying tax liability for sentencing purposes. The parties agree, however, that the combination of an adjustment for acceptance of responsibility and a downward departure on the ground described in subparagraph 4 below yields an offense level of no higher than 4;

4. The parties agree that a downward departure pursuant to Guidelines § 5K2.0 is warranted in this case based on factors not adequately taken into account by the Sentencing Guidelines, namely, the unusual circumstances of these two cases, including the following:

   (a) The Court of Appeals' decision in No. 99-3044 concerning act of production immunity creates considerable uncertainty whether, based on the legal standards announced by the Court of Appeals, the United States would prevail in further

proceedings in the District Court on Defendant's Motion to Dismiss;

   (b) The resolution of two complex cases in lieu of trial, thereby permitting the government and the Court to allocate their resources to other matters; and the strong governmental and public interest in concluding matters as expeditiously as possible and

5. The parties also agree that no adjustment for grouping is appropriate with respect to this plea and that no further downward or upward departure from that set forth above is warranted. The adjusted offense level is therefore no higher than 4.

B. Criminal History Category and Sentencing Range

Based upon the calculations set forth above and the Defendant's Criminal History Category, the sentencing range is 0-6 months. The specific sentence, agreed to by the parties, pursuant to Fed. R. Crim. P. 11(e)(1)(C), is a term of 1 year of probation with no special conditions of confinement, to commence upon sentencing, no restitution, no fine, and a special assessment of $25. The patries agree that no fine or restitution is appropriate on this Count for the reasons set forth in paragraph 8 below.

8. The parties agree that no fine is appropriate in view of the fact that the Internal Revenue Service asserts taxes, penalties and interest owing from the Defendant in excess of $761,123.15, and that the Defendant has substantial other debts and no substantial assets or substantial source of income. The Defendant agrees to use his best efforts to work with the Internal Revenue Service in a cooperative fashion to make reasonable payments toward his tax liability given the financial resources available to him.

Prior to sentencing, Defendant Hubbell agrees to pay $125 in special assessments.

9. Pursuant to Guidelines § 6A1.1, the parties jointly recommend that the Court direct that no Presentence Investigation and Report be made and that the Court proceed to sentencing immediately upon the entry of the guilty pleas. Defendant and the United States recommend that the Court make a finding pursuant to Fed. R. Crim. P. 32(b)(1)(A)&(B) that in light of the Presentence Report from *Hubbell I*, the length of the investigation in these matters, the previous proceedings before this Court between Defendant and the United States, the factual record developed in the preliminary proceedings and motions in these matters, and in the interests of all parties and judicial economy and finality, the Court has information sufficient to exercise its sentencing authority meaningfully without a Presentence Investigation and Report. However, should the sentencing judge defer the decision whether to accept or reject this Agreement, pursuant to Fed. R. Crim. P. 11(e)(2), until after there has been an opportunity to consider a Presentence Investigation and Report, nothing in this Agreement limits the rights of the parties to answer any inquiries from the United States Probation Office or the Court.

Nothing herein shall limit or in any way waive or release any civil claim, demand or cause of action, whatsoever, of the United States or its agencies relating to the conduct of the Defendant in this case. This Agreement is limited to matters within the jurisdiction of the Independent Counsel, and cannot bind other federal, state, or local prosecuting, administrative, or regulatory authorities except as to the matters set forth in this Agreement.

Nothing in this Agreement shall limit the Internal Revenue Service, as provided by law, in its assessment and

collection of said taxes, interest, or penalties from the Defendant.

10. The parties acknowledge and agree, pursuant to Fed. R. Crim. P. 11(e)(4), that if the Court rejects this Agreement, the Court shall, on the record, inform the parties of this fact, advise the Defendant personally in open court, or, on a showing of good cause, *in camera*, that the Court is not bound by the Agreement, afford the Defendant the opportunity then to withdraw the pleas, and advise the Defendant that if the Defendant persists in his guilty pleas the disposition of the case may be less favorable to the Defendant than that contemplated by this Agreement. Nothing in this Agreement waives the Defendant's rights under Fed. R. Crim. P. 11(e)(6) or Fed. R. Evid. 410.

11. With respect to the Defendant's post-incarceration period of supervision arising from *United States v. Webster Lee Hubbell*, No. LR-CR-94-241 (E.D. Ark.), the United States agrees that the offenses charged in Count 1 of Indictment Cr. No. 98-0394 and Superseding Criminal Information Cr. No. 98-0151 occurred prior to that supervision. In the event a violation proceeding is commenced by the United States Probation Office on the basis of these guilty pleas, the United States will recommend to the Court that such supervision be restored with no additional sanction.

12. This written agreement constitutes the complete agreement between the United States and the Defendant. The United States has made no promise or representations except as set forth in writing in this Agreement. The Defendant acknowledges that no threats have been made against the Defendant and that the Defendant is pleading guilty freely and voluntarily because the Defendant is guilty. Any modification of this Agreement shall be valid

only as set forth in writing in a supplemental or revised pleas agreement signed by all parties.

13. *Defendant's Signature*: I hereby agree that I have consulted with my attorney and fully understand all rights with respect to the pending matters. Further, I fully understand all rights with respect to the provisions of the *Sentencing Guidelines and Policy Statements* which may apply in my case. I have read this Agreement and carefully reviewed every part of it with my attorney. I understand this Agreement and I voluntarily agree to it.

Date: June 25, 1999 /s/ Webster L. Hubbell
WEBSTER L. HUBBELL
Defendant

14. *Defense Counsel Signature*: I am counsel for the Defendant in this case. I have fully explained to the Defendant the Defendant's rights with respect to the pending matters. Further, I have reviewed the provision of the *Sentencing Guidelines and Policy Statements* and I have fully explained to the Defendant the provisions of those Guidelines which may apply in this case. I have carefully reviewed every part of this plea agreement with the Defendant. To my knowledge, the Defendant's decision to enter into this Agreement is an informed and voluntary one.

Date: June 25, 1999 /s/ John W. Nields, Jr.
JOHN W. NIELDS, JR.
Counsel for Defendant

This Agreement executed on this 25th day of June, 1999.

Respectfully submitted,

/s/ KENNETH W. Starr by RWR
KENNETH W. STARR
Independent Counsel

/s/ Robert W. Ray
ROBERT W. RAY
Senior Litigation Counsel

/s/ David G. Barger
DAVID G. BARGER
Associate Independent Counsel

AGREED AND CONSENTED TO:

Date: June 25, 1999 /s/ Webster L. Hubbell
WEBSTER L. HUBBELL
Defendant

Date: June 25, 1999 /s/ John W. Nields, Jr.
JOHN W. NIELDS, JR., ESQ.
Counsel for Defendant

Date: June 25, 1999 /s/ Peter J. Romatowski
PETER J. ROMATOWSKI, ESQ.
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 98-0151 (JR)
UNITED STATES OF AMERICA

v.

WEBSTER L. HUBBELL,
Defendant.

COUNT ONE
(Willful failure to pay tax, 26 U.S.C. § 7203)

SUPERSEDING CRIMINAL INFORMATION

The United States by and through the Independent Counsel charges:

Count One

During the calendar years 1989-1992, 1994-1995, WEBSTER L. HUBBELL, the Defendant, had and received taxable income, on which taxable income there was due and owing to the United States of America, substantial income taxes. Defendant Hubbell was required by law on or before April 15, unless there was an extension, of each succeeding year, to pay the income taxes to the Internal Revenue Service for the preceding year. Between in or about December 1995 and October 1996, in the District of Columbia and elsewhere, including the Dis-

trict of Arkansas, WEBSTER L. HUBBELL, the Defendant, did knowingly and willfully fail to pay to the United States Department of the Treasury, Internal Revenue Service, a portion of the taxes due and owing, for Webster L. Hubbell for the calendar years 1989-1992, 1994-1995, in violation of Title 26, United States Code, § 7203.

/s/ Kenneth W. Starr
by David G. Barger
KENNETH W. STARR
Independent Counsel